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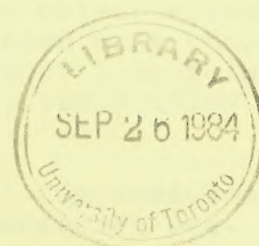
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SELECT COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1983-84

WEDNESDAY, SEPTEMBER 12, 1984

Afternoon sitting



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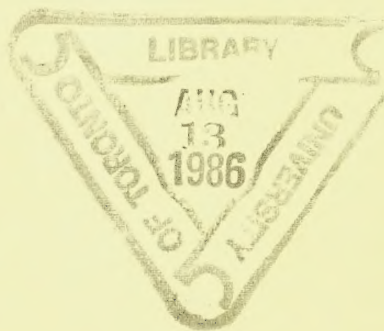
Bohnen, L., Director, Investigations
Catton, N., Assistant Director, Special Services
Hill, Dr. D. G., Ombudsman
Zacks, M., Director, Legal Services

From the Ministry of Labour:

Hess, P. A., Director, Legal Services Branch

From the Workers' Compensation Board:

Emmink, A., Assistant Secretary of the Board
McCracken, Dr. W. J., Medical Consultant, Appeals



LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Wednesday, September 12, 1984

The committee resumed at 2:05 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: I call the committee to order. We have Mr. Paul Hess with us, the director of legal services for the Ministry of Labour. Mr. Hess, we welcome you. As you are aware, we have asked you to be here today so the committee can discuss with you its long-standing recommendation regarding an amendment to the Workers' Compensation Act.

Mr. Bell may have some remarks at this point.

Mr. Bell: Mr. Chairman; let me just give a lead-in. You do not need to turn to the appropriate place in volume I.

About seven reports ago, this committee supported a recommendation of the Ombudsman that there be an amendment to the Workers' Compensation Act giving the board the discretion, if it saw fit, to either write off or recover an overpayment made to a worker pursuant to compensation benefits.

That recommendation was accepted by the Workers' Compensation Board which recommended consistently to the Ministry of Labour that it be included in the next package of amendments tabled in the House. It was always postponed pending the matter of the white paper and any legislation flowing therefrom and, of course, as you all know, that bill amending the act was tabled recently. It is being considered next door.

The problem for this committee is that particular amendment is not in the package, so pursuant to your direction on Monday, I spoke briefly with the minister and Dr. Wolfson, the assistant deputy minister. They have requested Mr. Hess to appear before you, first, to explain why it is not in the package of amendments, and second, what, if anything, can be expected in the future as to such an amendment.

Mr. Hess: Mr. Chairman, thank you for your courtesy accorded to me in allowing me to be here. I guess what I have to do is to explain to the members of the committee and to the chairman that it was a legal opinion that the Workers' Compensation Board did not have statutory power to waive, write off or reduce any amount of overpayment that had been made under the provisions of the Workers' Compensation Act. What I am going to develop is a somewhat technical legal argument, but I think it will explain what we have done.

As I presume you are all aware, the Workers' Compensation Board is a creation of statute, the Workers' Compensation Act.

Therefore, it would only have the powers conferred upon it by that act. One of the provisions that existed in the act--that is the act that is now in place and not the one that will be in place with the proposed Bill 101--section 55, sets out, (1) that the body corporate incorporated under the name "Workers' Compensation Board" is hereby continued under that name and, (2) the Corporations Act does not apply to the board.

That meant the provision in the Corporations Act conferring upon the Workers' Compensation Board all the powers and capacity of a natural person were not given to the board. Therefore, it necessarily followed that it had only the powers the statute itself conferred upon it and that could be found within the actual language of the Workers' Compensation Act.

I am sure and I hope--perhaps I should preface it that way--that you will agree that a natural person--that is, you or I, we are all natural persons here in this room--can compromise, can waive, can forgive, can recover, if one sees fit, and so forth, anything that anybody presumably owes to one. We can sue for it, and so forth.

So what we have done in Bill 101--and this has been carried by the committee meeting in the next room--is made an amendment to that section. We have provided and have continued the provision in subsection 2 that exists now, that the Corporations Act does not apply to the corporation, and subject to the provisions of this act, the corporation shall have the capacity and powers of a natural person.

It is my view, with respect--and I say that in a very respectful manner--and the views of those of counsel of the legislative counsel office, that this would confer upon the Workers' Compensation Board the powers of a natural person, which it never heretofore possessed. Therefore, it could do as any one of us could do: compromise, waive, forgive, collect, and use what legal means are available to any individual in that regard. That is the way we have done that.

There is another fundamental reason for this. As you know, every year things get added to the powers of the board. We are now up to I forget what letter of the alphabet. If we added this in--it could be done in different ways, but suppose we keep frittering away at it, I guess, we keep having people look at the statute and say, "Is it in the language of the statute?"

With this amendment we hope to avoid all that, although necessarily in some respects we do have to set out certain specific powers because of the privative clauses we have applied. That is the reason we have set out--in case someone raises that in answer to me--certain specific powers. With regard to those, we have included a very wide and sweeping privative clause. I do not think it is anybody's intention to have the courts overlook everything that the Workers' Compensation Board does.

This is the way we have approached it and it would be my respectful submission to the members of the committee that this be

accepted and that we have now met with it, not in a direct fashion, but we have done so in a very positive way.

Mr. Chairman: Do members of the committee have any questions to direct to Mr. Hess?

Dr. Hill: Mr. Chairman, we concur with the amendment. I have discussed it with my staff and we concur with what Mr. Hess proposes and with the amendment.

Mr. Chairman: Mr. Bell, do you have any comments?

Mr. Bell: No. It sounds good to me.

Mr. Chairman: Fine.

Thank you very much, Mr. Hess. We appreciate your appearing before the committee.

Mr. Hess: I am obliged to the committee for the opportunity. Thank you very much.

Mr. Bell: When was the last time you appeared before a committee without any questions asked? You do not have to answer that.

Mr. Hess: If you want to come next door, you will hear lots of those.

Mr. Chairman: Fine. We are going to resume our discussion on the detailed summary of case 16. We were in the midst of questioning when we broke for lunch. At that point, I believe the committee had exhausted its questioning up to that stage anyway and Mr. Bell had a number of questions he wished to pose.

Mr. Bell: Thank you, Mr. Chairman.

There is an issue, Mrs. Catton, that neither you nor Mr. Emmink have addressed, and that is the reference in Mr. Alexander's response to the report that the complainant may have taken a new position vis-à-vis the board and compensation in respect of the first two events which the synopsis and the material describe as noncompensable.

Mr. Emmink, what, if any, relevance does the position which you now understand the complainant has taken have to the Ombudsman's recommendation and your response?

Mr. Emmink: The complainant has recently taken the position that there was an incident in his employment in 1969 and that it was this incident rather than a noncompensable incident that is responsible for the surgery he had in 1970. That contention was thoroughly investigated by the board staff and the matter of a decision on that issue is now before the claims review branch. I do not know what that decision will be.

Mr. Bell: In your view, does it affect the Ombudsman's recommendation or position?

Mr. Emmink: I do not know how it could affect the Ombudsman's position, but I think perhaps his staff would be in a better position to respond to that.

Mr. Bell: What is the board's view, though?

Mr. Emmink: That it does not affect the issue that is before this committee.

Mr. Bell: Mrs. Catton?

Mrs. Catton: I agree with Mr. Emmink.

Mr. Di Santo: We are all reasonable people.

Mr. Bell: Mrs. Catton, the medical referee's report and the board's decision making it conclusive, does that act by the board bind the Ombudsman in any way?

The way I should ask it is: Is the report, for the purpose of the Ombudsman's process, conclusive on him?

Mrs. Catton: The board takes the position that it is bound by that report in reaching its decision.

Mr. Bell: I understand. What is the Ombudsman's position? Is it binding on the Ombudsman?

Mrs. Catton: No, but the Ombudsman certainly has to look at the board's reasoning.

Mr. Bell: Is the conclusive nature of the report, as argued by the board, binding on this committee?

Mrs. Catton: No. I remind the committee that in an earlier case they took the position that the medical referee's report was not conclusive. I cannot remember what report it was in, but I am sure counsel would remember.

Mr. Bell: All right. Lastly, this type of a case is a very difficult one for the committee because it is being asked by both of you to, in effect, prefer one set of medical opinions over another. That, of necessity, would require the committee to examine in some detail the nature, quality and qualifications of the people giving the reports.

Maybe you can help me in that regard.

2:20 p.m.

On page 2 of the synopsis, the first doctor there whose opinion you rely upon is Dr. G. You then at the top of the page attribute an opinion to him that the disability was related to an accident at work. Are you in possession of an opinion wherein in that language Dr. G expresses that opinion?

Mrs. Catton: I do not have it right here with me. It was simply a form and they asked the origin of the accident. In just a brief note it was stated the disability was related to an accident at work. It was not an extensive opinion.

Mr. Bell: Is this a Workers' Compensation Board form?

Mrs. Catton: I think it was.

Mr. Bell: Is that entry made as if an opinion is given or is he merely passing on information that he may have got from other sources?

Mrs. Catton: I cannot answer that.

Mr. Bell: Maybe you can have someone assist you and get back to it as we proceed.

Dr. A is the person you have retained?

Mrs. Catton: That is right. He is an orthopaedic specialist.

Mr. Bell: All right. I do not think you have to give us any more explanation about that.

Ms. Bohnen: Mr. Bell, before you continue, I would like to say something. It struck me that the introduction to this question indicated a view that the committee was redeciding the same case as went to the Ombudsman, weighing the medical evidence on each side.

I know you will correct me if I am mistaken, but I thought from previous statements made by the committee that it would not function as a court of appeal in this situation but rather look into Ombudsman cases to establish if procedures have been followed correctly, whether the investigation was reasonable and whether the Ombudsman's opinion appeared to be reasonable and makes sense on the strength of the evidence before it.

It seemed to me from the way you posed the question you were changing that approach and asking what the qualifications of the doctors were, to weigh them afresh for yourselves rather than see if you thought the exercise of the Ombudsman's discretion was reasonable.

Mr. Bell: You are not mistaken about the committee's task. You are mistaken if you think I am setting upon a re-review or a reinvestigation of the case. The committee has to decide, whether it is by the application of the policy of the benefit of the doubt or acceptance of your conclusion, that the weight of medical evidence is preferable as you stated or as did the board. They have to know, have the benefit of the material and the information you had available to you, including who these doctors are. I mean nothing more than that.

I think it is quite relevant for the committee to know if Dr. G did state that. We found out it is a form. We have to take

what Mrs. Catton says, that she believes it is an opinion. If it is not an opinion, I am sure she will come forward and tell us that.

I am not doing anything new other than we do in all of these cases where we have to decide whose conclusion is the preferable one. If you can assist the committee in any other way of doing it, we would certainly appreciate it.

Ms. Bohnen: Perhaps I was mistaken in what you were intending to do.

Mr. Bell: Mrs. Catton, you quote Dr. B's 1979 opinion. I would just like to examine the language of that for a moment starting at the second line. He said, "If Mr. K's symptoms could be attributed to one specific injury it would appear, in my opinion, most likely related to the injury in 1975."

He qualifies his opinion by an ability to attribute the symptoms to one specific injury. Has that been done? Have these symptoms been attributed to one specific injury?

Mrs. Catton: No.

Mr. Bell: What does that do to Dr. B's opinion?

Mrs. Catton: What the doctor is saying to us is that if you have to affix liability or responsibility to one incident, it would be the 1975 incident, although it is very difficult to do. That is what that says to me.

Mr. Bell: I am sorry, maybe it is my--

Ms. Bohnen: Would it be of any assistance to read more of the opinion to you? I think part of the difficulty is in the synopsis. As you know, we tried to be very brief and it is difficult to weigh them out of context. There are two or three paragraphs of his opinion speaking to this point which I think would give you more of a flavour of the man's opinion. May I read them to you?

Mr. Bell: Certainly.

Ms. Bohnen: "The problem arises as to whether his symptoms are directly attributable to injuries sustained at work or to the previous motor vehicle accidents. On a time basis, it would appear that the patient had recovered following his motor vehicle accident in 1968 and indeed the most recent one in 1972. Indeed, he worked for approximately three years without any particular problems in the back and was involved in a fairly active area at the employer.

"Following a twisting injury at work, however, it appears that this patient has for all intents and purposes been off work. This twisting injury appeared in August 1975. It appears that Mr. K was able to return to work in November and had been judged fit at that particular time. Unfortunately, the repetitive bending and lifting seemed to reaggravate his initial problems. I feel that this is a logical explanation for the recurrence of symptoms.

"I feel that the patient had made a satisfactory recovery from the injuries sustained in his motor vehicle accidents. He apparently did not have any particular problems for three years and therefore I would not anticipate him to have any problems directly related to these injuries after this extended period of time. However, I feel it is quite in keeping that patients often have a recurrence of problems in the back in a short period of time after returning to the work area.

"I would suggest that when the patient returned in November 1975, he began to be involved in repetitive lifting and bending and thus began experiencing more problems in the back. I would agree that certainly his back was therefore vulnerable to further injury because of the twisting injuries of 1975 and not from the fact that he had been involved and sustained injuries in previous motor vehicle accidents.

"Obviously this is a very difficult question to be dogmatic about; however, in my opinion it would appear that if Mr. K's symptoms could be attributed to one specific injury it would appear in my opinion they are most likely related to the injury in August of 1975."

I think that his opinion is fairly strong that the cause is the compensable injury, not the car accidents and that the last paragraph, which is quoted in the synopsis--

Mr. Bell: And in the report.

Ms. Bohnen: --and in the report, is perhaps not as complete as it would have been had we quoted all three paragraphs. Of course, the board has the full report.

Mr. Bell: Are you satisfied then that this doctor had, in giving the opinion, attributed the symptoms to one specific injury?

Ms. Bohnen: I think that is what he says.

Mr. Bell: All right.

Interjection.

Ms. Bohnen: Yes.

2:30 p.m.

Mr. Bell: Mr. Emmink, the board relies on the two opinions of the two doctors, or maybe three, Dr. F, Dr. D and Dr. E. Would you just give us some background? Dr. D is a surgical consultant employed by the board?

Mr. Emmink: That is correct.

Mr. Bell: The opinion he gave, some of which is set out in the Ombudsman's report, is an opinion after reviewing the board's file?

Mr. Emmink: That is correct.

Mr. Bell: He did not examine the complainant personally before giving the opinion?

Mr. Emmink: I am not sure if I am getting my cases mixed up. I thought he had examined the complainant. I am just trying to find out where that is.

Mrs. Catton: No.

Mrs. Bohnen: We do not believe he did examine him.

Mr. Bell: It is not apparent from a memo that is set forth in the report.

Mrs. Catton: The memo is basically quoted in full.

Mr. Emmink: No. At that time, the doctor had not examined the patient.

Mr. Bell: Is it fair in reading that memorandum--it is set out on page 4 of the report and page 50 of this material--that his comments, with the exception of his conclusion at the bottom, are more of a general nature respecting degenerative disc disease as those diseases that apply specifically to the spine?

Mr. Emmink: With the exception of the concluding comments, they are of a general nature. That is correct.

Mr. Bell: He speaks to the very difficult problem one has when one has a degenerative disc disease situation superimposed on the work place and on the responsibilities of the board under the act.

Mr. Emmink: Yes. He does preface that memo though with a very detailed analysis in a previous memo of all the documentation in the file.

Mr. Bell: It is presumed Dr. E was the medical referee? No, I am sorry.

Mrs. Catton: Dr. F.

Mr. Bell: Dr. E is another board consultant?

Mr. Emmink: That is correct.

Mr. Bell: Is Dr. D an orthopaedic specialist?

Mr. Emmink: I can find out in just one moment. Dr. McCracken informs me that Dr. E is qualified as a specialist in general and traumatic surgery.

Mr. Bell: Meaning he is not an orthopaedic surgeon or an orthopaedic spacialist?

Mr. Emmink: He is not an orthopaedic surgeon.

Mr. Bell: Is Dr. D an orthopaedic surgeon or an orthopaedic specialist?

Mr. Emmink: No, he is not.

Mr. Bell: Dr. K, the medical referee, is he an orthopaedic specialist?

Mr. Emmink: He is, yes.

Mr. Bell: I do not want to get hung up on semantics, but you answered a couple of questions from Mr. Di Santo this morning about the use of the word "likely" as it is contained in the medical referee's report. Did you say if he had used the word "possible" it would have made a difference?

Mr. Emmink: I would say "possible" is not as specific as "likely" or "probable."

Mr. Bell: If he had used the word "possible," would it have made a difference to the board?

Mr. Emmink: I believe so.

Mr. Bell: For what it is worth, the Concise Oxford Dictionary, Mr. Emmink, believe it or not, defines "possible," at least in the second definition, as "that is likely to happen." I do not know what that does for anybody, but you might want to comment on that if you choose to.

Mr. Emmink: That comes as news to me. I thought there was a distinct difference between what is likely and what is possible. It is possible this room will collapse on us, but it is not likely.

Mr. Bell: Not according to the dictionary.

I am not so sure what follows from that, because at least two of the Ombudsman's specialists used the same word, for what it is worth.

Can you just explain, in 25 words or less, why the policy of the benefit of the doubt does not apply to this case?

Mr. Emmink: Because the case can be decided on a balance of probabilities, this being that, on a balance of probabilities, the layoff in October 1976 was more likely related to the significant noncompensable injuries and the significant noncompensable surgeries than it was to the incident that required four months off work a year previously.

Mr. Bell: What evidence do you say establishes that balance of probability?

Mr. Emmink: All the evidence referred to by the board, the board's own surgical consultants as well as the medical specialist, the medical referee.

There is also the very nature of the evidence, which has not been touched on. I think one of the important things here is that this man underwent surgery in 1977 for a condition which I believe the Ombudsman relates to the incident in 1975. However, in surgery in 1977, the operating surgeon found that the cause of the problem was a lot of scar tissue. Of course, this scar tissue was left over from the previous noncompensable surgery. That evidence in itself is very significant in this case.

Mr. Bell: One should never play numbers games when assessing the weight of medical opinions. Am I correct that if one lines up the numbers, there are two orthopaedic specialists who the Ombudsman believes have given opinions that support his position, and there is one orthopaedic specialist who has given an opinion that supports the board's position?

Mr. Emmink: Yes. I have trouble with one of those orthopaedic spacialists the Ombudsman relies on. I think this is Dr. C. He says here: "You requested whether this patient's present disability was related to his compensable problem. It is my feeling that it is."

However, if we go back to a subsequent report from this doctor, we note that he has a few things wrong in his perception of what the circumstances are. First of all, he says, "The patient had a compensable accident in January 1969." This is not true. I think the committee realizes that.

"The patient returned to work on July 7, 1969 and was only able to work one and a half months." He goes on to say, "He attempted to return to work on August 17, 1970 for approximately eight months and was then off work until October 7, 1976"--that is absolutely not correct, either--"when he twisted his back." He did not twist his back in October 1976. In 1981, he says, "He has been off work approximately five years." That may or may not be the case.

In any event, the point I am trying to make is that this particular doctor gave an opinion to the Ombudsman which in my view is based on some rather significantly incorrect information.

Mr. Chairman: I would like to pursue that a little bit further. When he makes reference to the compensable problem, was he indeed referring to the 1975 accident?

Mr. Emmink: He said that he had a compensable problem in January 1969. As we know, that was the noncompensable problem. I can see that if the doctor believed this problem to be compensable, he could relate the subsequent problems he was having to it.

Mr. Chairman: Does the Ombudsman agree that this doctor was making reference to another incident, rather than the one in 1975?

2:40 p.m.

Mrs. Catton: We agree that the doctor had the incorrect information. When we wrote to him to clarify his opinion, we provided him with the correct information. His response is what is quoted in the report. That was after he was supplied with the correct information.

Mr. Emmink: Except that the report I was quoting arrived after the medical report the Ombudsman relies on. So if the Ombudsman is saying that they gave him the correct information, obviously it did not sink in because he later reported the wrong facts.

Mr. Bell: Have you seen that subsequent report, Mrs. Catton?

Mrs. Catton: The report is dated?

Mr. Emmink: December 7, 1981.

Mr. Bell: A year after the first one.

Mrs. Catton: I have the report. The only thing I can say is he starts off the report by saying, "This patient hurt his back in August 1975 at work and he has been having difficulty ever since." He does go on to relate the further problems to fibrosis after the disc surgery.

Mr. Bell: Does he describe an event in 1969, which you have probably described in your chronology as the 1979 compensable back surgery? Does he describe that as compensable?

Mrs. Catton: In the subsequent letter?

Mr. Bell: Yes.

Mrs. Catton: No.

Mr. Bell: Mr. Emmink says he does.

Mr. Emmink: I have the report here, Mr. Bell. It is dated December 7, 1981. He said, "The patient had a compensable accident in January 1969 when he sustained a compression fracture of T12/L1."

Mr. Bell: I thought Mrs. Catton had the report before her too.

Mrs. Catton: I am sorry, I was confused. Can we see that, Mr. Emmink?

Mr. Bell: Have you seen that before, Mrs. Catton?

Mrs. Catton: No, I have not.

Mr. Bell: How did the board get it and you did not?

Mrs. Catton: I might not have read it. It does not appear to be in our material.

Mr. Bell: To whom was it sent?

Mrs. Catton: It was sent to the family doctor and carboned to the board.

Mr. Bell: Are we correct; you have not seen that or your office has not seen that before now?

Mrs. Catton: I cannot say that I have seen it before, no.

What might have very well happened is that, as you know, we closed our file at one point when there was a reconsideration and we reopened it after the medical referee was appointed. This might have come to the board's attention some time during that period.

Mr. Bell: We have more work to do the rest of the afternoon. Do you want to consider that, take that letter under advisement and advise us before we close off today whether it has any effect on how you have categorized or how you have relied upon Dr. C's opinion?

Mrs. Catton: Yes.

Mr. Bell: I have nothing further, Mr. Chairman.

Mr. Chairman: Are there any further questions on this case?

Perhaps we will leave the summations until a later point in the day. We will deal with the next case and then we can come back to this and hopefully the Ombudsman's staff will have an opportunity to weigh the significance of that letter, and then we can have you sum up at that point.

Let us move on to 17. Mr. Bell.

Mr. Bell: Thank you, Mr. Chairman. This is in tab 17, the very next section of your brief, volume III. Please turn to the four-page synopsis which has been prepared for you.

Mrs. Catton has provided us with an additional handout, an August 1984 article in the Medical Forum that I am sure is going to tell you everything you wanted to know about carpal tunnel syndrome. I think some people call it Gordie Howe's problem.

Dr. Hill, Mrs. Catton, the committee is already aware that this is another issue of examining, assessing and deciding upon various or certain medical opinions and the preference given by the Ombudsman's office versus the Workers' Compensation Board. So when you are making your presentation, again, pay particular attention to the nature and detail of the opinions you rely upon and some full explanation why those opinions are considered to be the preferable ones.

Dr. Hill: Yes, Mr. Bell. I will make the opening statement. Mrs. Catton and Ms. Bohnen can give the detailed components of it.

Summary 17: Mrs. D tripped at work injuring her wrist in 1967. At the time of the accident she sought medical attention but did not lose any time from work immediately following the accident. About two years later Mrs. D required surgery on her wrist for carpal tunnel syndrome--for your assistance I have a layman's explanation of carpal tunnel syndrome--and at the same time a ganglion on the wrist was also noted. After one month she returned to work.

Again, eight years later her wrist required additional medical attention. The ganglion was removed and further carpal tunnel problems were diagnosed. Except for brief periods Mrs. D has not returned to work since 1978.

The board has acknowledged entitlement for the accident and made payments for the surgery to remove the ganglion in 1978, but has denied entitlement for the carpal tunnel syndrome. In my view Mrs. D was unreasonably denied entitlement for the carpal tunnel syndrome.

In support of this opinion I have relied on the evidence of Dr. A, Dr. B and Dr. D. The board has relied on the evidence of its surgical consultant, Dr. F, in its decision to deny entitlement. In my view the evidence is supportive of Mrs. D and I would ask you to endorse my recommendation.

Mrs. Catton: Just to review the facts of this case briefly, in 1967 the complainant fell and hyperextended her wrist. She went to the first aid and there was some swelling but there was no reason for her to lay off work so she continued to work basically until 1969. Although she had had some continuing symptoms all the way along, in 1969, about a month before she saw the doctor, her pain got worse. He eventually diagnosed carpal tunnel syndrome and performed surgery.

She went back to work about three weeks after the surgery and everything seemed relatively okay up until 1978 when a ganglion, which is basically a cyst, developed on the upper portion of her wrist. She went to see her family doctor who removed that ganglion; the problems in her wrist persisted. She went back to see the orthopaedic surgeon and the problems continued.

2:50 p.m.

There is a dispute between the family doctor and the orthopaedic surgeon in this case. The family doctor felt that the continuing problems after 1978 were related to the carpal tunnel surgery that the orthopaedist did in 1969. The orthopaedist felt that the problems after 1978 were related to the problems caused by the removal of the ganglion, so one doctor is blaming one doctor's operation and the other doctor is blaming the ongoing problem on another doctor's operation.

When the board was confronted with a claim for additional benefits, they referred the matter to a specialist who could not render an opinion on whether or not there was a relationship but referred it to another doctor, Dr. D, referred to in your summary.

Dr. D reviewed all the evidence and found that, in his opinion, whether the problem was in the front of the wrist or the back of it, it was still related to the compensable injury, and she should be compensated.

I can go over the medical evidence that is on page 2. Dr. B is the orthopaedic surgeon who, upon inquiries from her representatives, submitted the following report to the board:

"In my opinion a fall resulting in a sudden hyperextension injury to the wrist in 1967 could have caused a carpal tunnel type of syndrome which was relieved by surgery in 1969. I think that she should have some compensation because of her injury in 1967, until at least three weeks after the surgery was done in June 1969 [sic]." That should read "August 1969."

The information I am dealing with right now is whether or not the 1969 surgery was related. Certainly, to deal with this case you have to establish whether the 1969 carpal tunnel surgery was related to the original accident before you can decide whether the 1978 diagnosis of carpal tunnel syndrome is related.

The family doctor, Dr. A, stated: "It seems to me that the patient did suffer from an injury to the wrist, a wrist which became subsequently the site of a ganglion, which was surgically excised, and also of a nerve entrapment syndrome, which was apparently surgically treated by [Dr. B] in August of 1969..."

The board's surgical consultant reviewed the claim, and Dr. E found that neither the ganglion nor the carpal tunnel syndrome was related. Dr. F, another board surgical consultant, was in agreement with Dr. E, the reason being that there was too long a delay after the onset of the disability in 1969, in terms of the 1967 accident. That is why the board's doctors felt it was not related.

Before going over the medical evidence specifically concerning the 1978 disability, we should recognize at this point that in 1978, 11 years after the accident, the board recognized and paid for the excision of the ganglion, the lump in the front of the wrist. The board, then, has accepted entitlement for the ganglion removal.

On November 23, 1981, the report of Dr. A, the family physician, referred to "her current complaints, which I believe to be due to a compression of the ulnar nerve at the wrist and it is precisely this occurrence that, in my view, cannot possibly be separated from her accident of April 1967. I believe she should be given the benefit of the doubt."

I quoted earlier from the statements of Dr. D, the specialist in physical and rehabilitative medicine to whom the board's specialist referred the complainant. He stated, "I think the problems of the back of her wrist and the problems of the front of her wrist are clearly compensable, related to the same accident."

Dr. B, the surgeon who originally performed the carpal tunnel syndrome surgery, stated that the ongoing problems in 1978 were related to the removal of the ganglion, the operation performed by Dr. A.

Drs. E and F, both board surgical consultants, as outlined before, did not support a relationship.

Our position is that the opinions of Drs. E and F do not outweigh the positions of Drs. A, B and D, Dr. A being the doctor who has treated her for a number of years and, in fact, performed one of the surgical procedures; Dr. B being an orthopaedic specialist who performed surgery for carpal tunnel syndrome and who should be qualified to comment on the relationship, and Dr. E, who was asked to consider the case by the doctor to whom the board referred the matter.

I think that is very important for your deliberations. We have the board making a referral to a specialist who they think can answer the questions. The specialist says: "I do not know. I am going to send it to a colleague who can better deal with the problem." When the colleague deals with it, he feels there is a relationship, and we think that this evidence is significant. He certainly had all the evidence that the board doctors had before them when he made his opinion in support of the relationship.

The other concern we have in bringing this case to you is that I do not think the complainant should be prejudiced against because Drs. A and B cannot agree on the ongoing causes. It seems to us, anyway, that we have Dr. A, who performs surgery in 1978; he says his surgery was wonderful. Dr. B performs surgery in 1967 and he says his surgery was wonderful. No one is responsible for the ongoing problem, except they both agree that the ongoing problem is related to the accident. I think that is the important factor.

Mr. Chairman: Are there any questions at this point from the committee?

Mr. Philip: Let us hear from the board first.

Mr. Emmink: I think, to save the committee time, that the board's position is basically very simple. This is a case--and the Ombudsman has alluded to this--where we have conflicting medical opinions from, on the one hand, treating physicians and an orthopaedic specialist supporting the case, and, on the other hand, the board's own doctors. I believe this was touched on in the board's response to Dr. Hill's opening statement.

If I can just refer to what was said in the chairman's response to Dr. Hill's final report, and I am referring to the letter of July 6: "In the board's view, it is inappropriate for the Ombudsman to have used his criteria in weighing the medical evidence, the matter of whether or not the board's doctors had treated and examined the complainant or whether or not they had specialist's qualifications in the field of medicine involved.

"Certainly those concerns would be valid if the board's

doctors were directly involved in the diagnosis of the complainant's problems and/or the subsequent choice of treatment to correct the problem. Specialty training is similarly directed at the diagnosis and treatment of disorders in a particular field of medicine.

"The problem that faces the board in this case is not a problem of diagnosis or treatment. Rather, it was a matter of determining whether or not it was reasonable to consider that a given history could result in a given disability. For the purpose of resolving such a problem, the experience of the board's doctors in this particular area of medicine, that is, the determination of causal relationships between a given history and a given physical disability, is of far greater relevance and should therefore be given greater weight than the evidence of physicians whose training and experience lies entirely in the field of diagnosis and treatment."

I have with me here Dr. McCracken, who, with the committee's permission, is prepared to discuss some of the evidence in this case and to perhaps explain--hopefully, to the committee's satisfaction--why the board believes that the weight of evidence against a relationship is greater than the weight of evidence for a relationship.

Mr. Chairman: We are prepared to hear Dr. McCracken's testimony, but I would like to caution him. His testimony the other day caused the committee some problems in terms of new evidence, if you will, that the Ombudsman's staff had not been aware of prior to reaching a conclusion. I would advise you that this committee is not prepared to hear new evidence.

If you could confine yourself to the facts of the case as they are before us, your review of the case, and how you arrived at your decision, that is essentially all we are prepared to deal with, if you can do it within those confines.

Mr. Emmink: Our object would be solely to assist the committee. If the committee is of the view that Dr. McCracken's comments confuse rather than enlighten, then certainly I would not try to force that upon you.

Mr. Chairman: We are prepared to hear the doctor. I am simply cautioning him not to, as he did the other day, get into tests that had been carried out in the United States, and that sort of thing. That was new evidence, and essentially material that was not made available to the Ombudsman's staff in order to reach a decision.

3 p.m.

It did cause the committee some problems when we deliberated later that day, so if you could keep that in mind, we would appreciate it.

Dr. McCracken: I want to reassure the committee that my purpose here is to try to assist the committee by supplying two portions of data. One is the natural history of the disease in

question, which I attempted to provide concerning the other case the other day. The second thing I would like to do is to try and pass along my experience and information as it relates to aspects of the specific case.

It was not my intention to introduce new evidence. Should you feel, Mr. Chairman, that I am introducing new evidence, please stop me, because I certainly do not want to do that.

Mr. Philip: May I ask a question of Dr. McCracken? Why would you not prepare this kind of history so the Ombudsman would have an opportunity, prior to this hearing, to examine that, and to get another medical opinion as to whether your version of the history of the disease is the same as other doctors' versions?

I submit that what you did the other day was to provide new information which we, as lay people who are not medical doctors, had no way of checking out. You placed the Ombudsman in the very unreasonable situation of not having a medical adviser with him to contradict you, or to provide another medical opinion that might not have been--although it may well be that they might have agreed with you--the same as your version. I find that this approach is not in keeping with the system and the way in which this committee operates.

Mr. Mitchell: May I just add one comment? Some of the information that has come out in the past few days merely enhances an opinion that a lot of people have. Where we have always expected the medical profession to be a rather exact science, we now see, more and more each day, instances here--certainly, at least, in the comparisons that are drawn between the board's people and the doctor whom the person involved has brought in--of the need for the third opinion.

I must agree with Mr. Philip that the particular tests--and I did follow up with questions on the test you raised the other day, which did cause some real problems. I think the chairman should be commended for making that note at the very outset.

Mr. Zacks: We would also like to raise our concerns, Mr. Chairman, about the matters you have spoken to. I do not want to repeat that, but Dr. McCracken's intentions were also to give new evidence to this committee on matters involving this complaint.

If his medical opinion--and I am not about to go into any discussion of whether that is expert evidence or not. It is new evidence. We have not had a chance to investigate it. I think it even goes so far as to distort the process a bit. You are getting information that is new to us and to you. It has not been tested in any way, like the other evidence before you, and we think it verges on impropriety.

Mr. Bell: I think you have heard the committee, and I think you know that Dr. McCracken and Mr. Emmink have been cautioned with respect to anything they are saying. I do not think we want to preclude Dr. McCracken from participating, as he has been so advised, with the benefit of the comment.

Mr. Emmink: I do not want to belabour this point, either. I am rather disturbed, I suppose, that the information given by Dr. McCracken may be construed by the Ombudsman's office as "new evidence."

Dr. McCracken is giving nothing but what is the commonly-accepted view in the medical community, and surely the Ombudsman has an obligation to sufficiently acquaint himself with the current medical knowledge in the field he is investigating, so that this should not come as new information to him.

Mr. Chairman: I do not want to prolong this. We have expressed our concerns on this, and if we feel Dr. McCracken is getting out of line, I am sure someone will jump in. Dr. McCracken, would you like to proceed?

Dr. McCracken: Mr. Chairman, possibly you could help me. What do you think would be of greatest assistance to the committee members, for me to deal in a sequential manner with the data in this particular history--

Mr. Chairman: I am going to ask our counsel for some advice on that.

Dr. McCracken: --or to talk in generalities about the two diseases?

Mr. Bell: I can tell you an area where you can assist us. With the greatest of respect to Mr. Emmink, perhaps you can explain why, as Mr. Emmink has submitted, the opinions of the orthopaedic specialists who have examined and treated this complainant--one of whom was retained by the board--should be disregarded in favour of the opinions of your in-house people, who admittedly lack the qualifications of orthopaedic specialists?

Frankly, I do not understand Mr. Emmink's position. I thought, sir, that with your particular expertise--they are your colleagues, and many of them work under your control and supervision--you could assist the committee in understanding that position.

Mr. Chairman: Dr. McCracken, just one moment, please. I think Mr. Di Santo has a question.

Mr. Di Santo: I speak only for my side. We are in a situation where, from the board's point of view as expressed by the counsel, the quality of the opinion expressed by the board's consultants is considered superior because it relates to the relationship between the deceased and the accident, or whatever the situation was, as opposed to the opinion expressed by the other doctors who confined themselves to the diagnosis.

I think perhaps Dr. McCracken should explain to us why it is that the opinion of the surgical consultants is superior, and why it has to be more acceptable than the opinion of the other orthopaedic doctors.

Dr. McCracken: I am certainly very happy to address this question. As you can appreciate, it has been alluded to, and there has been some considerable discussion relative to this same matter in other cases.

I do have some concern that the committee does appear to feel rather strongly that an examination is the keynote and the linchpin of arriving at a cause and effect relationship. I think that this is very true immediately following an illness or an accident, and, indeed, this is exactly what doctors do.

In the history-taking and the examination, they carry out these activities in order to arrive at a working diagnosis and in order to determine what the type of treatment shall be. This is considerably different from attempting to look at the situation as it prevails months or years after the accident or illness.

In my opinion, the importance of the examination decreases as to the passage of time, and the background data, especially the recorded history of the illness or injury, becomes more important with the passage of time. Indeed, that is why the compensation board, when it asks an outside consultant to examine a patient and to supply a report to the board, will almost invariably supply to that consultant photostat copies of the background of the injury, the medical treatment and the opinions expressed, because it is appreciated that this is so important.

3:10 p.m.

If you have that type of information, and if you have the specialist training in surgery--and I should point out to you that general surgery is still the main scientific training base for all surgeons. Most of the training that an orthopaedic surgeon will take is, in effect, general and traumatic surgery with, towards the end of his training, specialization in orthopaedics. It is similar with neurosurgery and with plastic surgery.

It is considered the general surgeon is probably the best-equipped specialist to look at the overall problem in the field of surgery and to make a determination of the relationship between one condition and another from a surgical perspective. If he has the background data, the history of the injury, the history of treatment, what has happened in the course of treatment, then he is in a position to evaluate exactly what the problem may be.

On the other hand, if he is a physician--a specialist if you will--who is examining the patient once or years after the episode or the injury and if he must rely primarily upon the history being recounted by the patient, it is well established that under those circumstances errors will creep in when recounting the history due to the passage of time. If nothing else, people tend to forget the dates when their illness occurred; they tend to forget the dates when certain procedures were carried out; they tend to change their perception, if you will, of the events that have taken place in the past. This is why the value of recorded data is so important in evaluating such cases as this.

I think this is extremely important. By having that data the doctor, whether he is a doctor in the employ of the Workers' Compensation Board or an outside physician seeing the patient, and indeed the board in the situation where the patient is referred to a new specialist, will, upon request, supply to that specialist photostat information from the file in order to assist him to carry on the continuity of evaluation and treatment. This becomes very important.

Having said that, I can only say that when a physician is in a position where he has all the data available to him in the file and when he is in the position of having years of experience in compensation medicine, which is a rather specialized branch of medicine I might add, in all probability such a physician is better able to hand down a good and valued judgement as it relates primarily to cause and effect, the progress of a disease and the ultimate prognosis.

I submit that is exactly what has happened in this case and I submit that is why there has been some divergence of opinion between the board physicians and, as a matter of fact, some obvious divergence of opinion between the treating physicians. As has been brought out, one physician feels the ongoing problem is not related to the condition where he was the surgeon and the other physician feels the opposite, namely, that the ongoing problem is not related to the surgery of which he was the author.

It is my recollection of looking at the reports in the file that the surgeon who was requested to examine and review this case on behalf of the board could not really come to any definitive conclusion despite having had the data supplied to him by the board and he rather referred the issue to another physician. I do not have the numbers in front of me. You people have that in your documentation.

Mr. Bell: That was D, I think.

Dr. McCracken: It was referred to physician D, who is the specialist in rehabilitation for physical medicine. Whether that physician had copies of the documentation before he carried out his evaluation, I do not know, but it certainly would have been of great assistance to him if he had had such documentation. He was of the opinion that both conditions, as I understand it, could be related to the original accident.

I think that is about as far as I can go without getting into the details of the course of the illness and the history of the injury.

Mr. Bell: Before questions and before you finish, Mr. Emmink also said, I believe, "Because our consultants do it every day"--that is, examine the issue of causal relationship between an incident and symptoms--"our people are better at it than somebody in private practice who may not do it every day."

If you understand what I just said, can you expand on that? Why, after an examination of documentation, does it give your

in-house people a leg up on, for example, an orthopaedic surgeon who actually operated on this person?

Dr. McCracken: Mr. Bell, I would suggest that one way of approaching this is to look at my own situation. During the 21 years I was in the active practice of surgery, and since I was involved in the initial assessment of, evaluation of and actual surgery on the patients referred to me, I had no question in my mind at all that I was much better equipped to evaluate the appropriate treatment modality--in other words, what type of surgery and what specific surgery would be best in the interests of achieving a cure in a given patient--than a doctor who was not actively engaged in surgery.

On the other hand, for the past 10 years now I have been involved primarily in administration and in evaluating or looking at the complex problems from a medical standpoint that the board encounters, and I would deem that I have now reached the point where I no longer at the moment have the same degree of expertise to evaluate the specific surgical procedure, when it should be done, how it should be done and under what circumstances in a specific case as I had when I was in practice. But on the flip side of the coin I feel I am much better prepared and equipped now to carry out an evaluation of the cause-effect in what I deem and call compensation medicine.

That really is the only way I can answer it. The vast majority of the doctors at the board, certainly the surgeons at the board, have all had considerable experience in private practice and in the operating room and in doing surgery, but since coming to the board they have put that aside and have concentrated on becoming the experts in evaluation in compensation medicine: the basic cause-effect rather than the evaluation of clinical findings and the determination of what specific type of treatment is required. Those are two completely different areas in medicine, in my opinion.

Mr. Mitchell: I guess that should be followed with a question. Why would the board find it necessary in some cases then to bring in a medical referee?

Dr. McCracken: In almost every instance, in my experience, in which not a referee--because it is my understanding that the term "referee" is pretty well restricted to the medical person as identified in the situation at the appeal level, where the referee is identified--but, aside from being at the appeal level, it is not at all uncommon for the board's doctors, the surgeons, to look at a case and to come to the conclusion that the problem is of such complexity--and these are usually ongoing cases with ongoing symptoms and signs and ongoing treatment in many instances--that it is deemed by the surgeon of the board that he would be well advised to seek the opinion of an outside senior specialist in that field, and he usually is a senior specialist.

3:20 p.m.

To help get the answers he feels he requires, almost invariably a letter will go to the specialist, usually with

photostat material of previous reports and so forth. Not infrequently the specialist at the board will tell the outside specialist, "The answers I am looking for are as follows," and will list what he hopes the outside specialist can give him which will be of assistance.

I hope that answers your question.

Mr. Mitchell: Since the door has been opened, how many practitioners or doctors would the Workers' Compensation Board have on staff?

Dr. McCracken: On permanent staff?

Mr. Mitchell: Yes.

Dr. McCracken: I cannot tell you at the present time, in view of the fact that in my new position I do not have that data coming to me, but as of February of this year, between the hospital and the head office operations and our operations in Sudbury and London, we had an establishment of 69 full-time physicians.

Mr. Mitchell: That is including in the hospitals.

Dr. McCracken: Our hospital and rehabilitation centre in Downsview, yes.

Mr. Mitchell: Am I correct in what was stated earlier by Niki, that the board asked a specific doctor to make an evaluation in this case, and he felt he could not do so? Was it he who called on another specialist, and is that specialist identified as Dr. D?

Mr. Emmink: That is correct.

Mr. Di Santo: Was his (inaudible) the photocopies and background material that Dr. McCracken was talking about?

Mr. Emmink: Dr. D?

Mr. Di Santo: Yes.

Mr. Emmink: I do not know.

Mrs. Catton: He was provided with a one-page history from Dr. E.

Mr. Mitchell: He was provided with what?

Mrs. Catton: With a one-page history of the situation from 1967 to 1978, by the board's surgical consultant, Dr. E.

Mr. Mitchell: If I read correctly, Dr. E says--if we are talking about the same doctor--that "Neither the carpal tunnel syndrome nor the ganglion were in any way related to the fall. It is my view that they would have surfaced long before two years and two months after the incident."

The doctor to whom he referred this particular person, however, comes up and says: "I think the problems of the back of her wrist and the problems of the front of her wrist are clearly compensable, related to the same accident incident." Is that right?

Mr. Emmink: I do not believe that the board referred the person to Dr. E.

Mr. Mitchell: Not the board, the doctor that the board asked--

Mr. Emmink: Yes, that is true.

Mr. Mitchell: Dr. E referred her to Dr. D.

Mr. Emmink: That is right, yes.

Mr. Mitchell: Who provided this material, by the way? I may have been out when it came in.

Mr. Zacks: We did.

Mrs. Catton: It is from the Harvard Medical School health clinic.

Mr. Mitchell: Okay. I read in the facts that in June 1979 the person in question was laid off work permanently because of a wrist disability. I would like somebody to comment on that because, reading the information that was provided to us, the last two statements on the last page say: "Relief comes rapidly--often within hours. After a few days, the bandage and stitches can be removed and normal life resumed."

Mrs. Catton: So you want an explanation of why she is not back at work?

Mr. Mitchell: I see that the person in question is claiming benefits. I would gather from that, then, that the problem still exists.

Mrs. Catton: The problem still exists. She did have surgery in 1969. From my understanding of the medical report of Dr. D, they had not done surgery again in 1978. There was some scar tissue growth where the original surgery was done, and they had not done surgery the second time.

Mr. Mitchell: The third basic treatment for carpal tunnel syndrome listed on that page gives me some difficulty. The operation required, according to this document you have provided us with, "can be done as day surgery." The doctor was very explicit. Here again we have--and this is where I have a personal problem, as I said earlier--people in a science whom those of us who are patients or expect to be patients look on over the years as people in whose hands we put ourselves. We get so many divergent opinions, particularly in all these cases.

Mr. Emmink: Mr. Mitchell, I wonder if I can just make something clear. In case the committee is getting a mistaken

impression, in the vast majority of cases the board's physicians and the attending physicians do agree; it is just that in some cases they do not.

Mr. Di Santo: Cases of this type.

Mr. Emmink: In cases of this type they do not agree. I would not want to leave the committee with the impression that this occurs all the time.

Mr. Mitchell: No, I realize that many cases are resolved; they never get to this committee. But where we see the difficulty--and I go back to a specific situation yesterday--I see the testimony of doctors who were involved in the actual treatment of the person, of the physical ailment, being contradicted by doctors who are specialists in other fields, and I think you know the ones I am talking about. I am sorry, but some of these things really leave me puzzled.

Mr. Philip: I guess if I am to be consistent--and I believe in trying to be consistent--I will have to ask this question of the Ombudsman's people. Was it Dr. McCracken who supplied this piece of paper before supplying it to members of the committee?

Mrs. Catton: No, it was not.

Mr. Philip: I really think if I am going to come down on the board as introducing new evidence, then I do not think we should have regard for whatever is in this piece of paper. I just caution that if we are critical of the government for doing this, then we should also be critical if the Ombudsman slips into it.

I have a question for Dr. McCracken. We have just been told by the Ombudsman that Dr. E did in fact supply a history to Dr. D. You were implying that Dr. D might not have had the history of the particular client. Is that not correct?

Dr. McCracken: Yes, that is right. I was not certain what documentation--and I believe you are referring to the specialist in rehabilitation medicine.

Mr. Philip: That is right.

Dr. McCracken: As I say, I am unable to refer to the identifiers.

Mr. Philip: Would you now agree that Dr. D with this case history would be in the same position to make a judgement on cause as your own in-house doctors?

Dr. McCracken: No, I do not think he probably would be, because, as I understand it, it is a copy of a one-page summary as against the contents of the file. I would be of the opinion that he was shortchanged there, that he should have had more documentation than a one-page summary.

Mr. Philip: Was Dr. E supplied all the information he should have had when you originally hired him as a consultant?

Mr. Emmink: I think I can assist there. Dr. E, to the best of my knowledge, was supplied with photocopies of various reports and data in the file.

Mr. Philip: So Dr. E would have made a summary of this, and that was what would have been supplied to Dr. D.

Mr. Emmink: I presume that that is what would have occurred.

Mr. Di Santo: Is Dr. E a full-time board consultant?

Mr. Emmink: He is not in the board's employ; he is an outside, independent physician.

Mr. Philip: But you have no reason to believe and none of your in-house doctors had any reason to believe, nor have they given us any evidence, that the summary made by Dr. E based on all the information in the file, to which they had equal access, was in any way incomplete or that Dr. D was in any way, to use Dr. McCracken's word, shortchanged.

3:30 p.m.

Mr. Emmink: We do not know that, sir. We do not know what that summary said. I do not really--

Mr. Philip: So we do not know that they were shortchanged, and Dr. McCracken's statement is completely unfounded. Is that what you are saying?

Mr. Emmink: Well, not completely, sir, because the board's doctors did have the entire file, which is substantial, and no matter how good a summary writer a person may be, it is difficult to condense all of that into a one-page summary.

Mrs. Catton: Jim, the one-page summary I was referring to was the letter of referral from the board's surgical consultant to Dr. C. Dr. E then reviewed Dr. D's report, which was extensive and had another one-page history of his own in it, and there is no comment in Dr. E's memo of rebuttal that Dr. D did not have all the information. He just disagreed with him because there was the two-year gap. The question of whether or not Dr. D had all the information never came up in Dr. E's evaluation of that report.

Mr. Philip: Let me ask Dr. McCracken this: If I were a doctor disagreeing with another doctor and trying to present my case that this other doctor's opinion was wrong, would I not, as part of that presentation, argue if there were something that had been missing in the information supplied to the other doctor?

In other words, if he had incomplete information on which to make his decision, I would think that this would be a key argument against him, yet we are told by Mrs. Catton that there is nothing in Dr. E's report which indicates that.

Dr. McCracken: If I might, I must confess that I have grave reservations about summaries. As you can appreciate, a summary, no matter how unbiased the individual developing the summary might be, does indeed represent to a significant degree the interpretation of the person rendering the summary. That is why I feel that summaries tend to be dangerous documents.

Certainly, I can tell you that when I was in the private practice of surgery, and I had a compensation case come to my attention where opinions were required for a motor vehicle accident case, there was one thing I always did. I always requested that either all pertinent and available medical reports be supplied to me, or that I be told where I could avail myself of them, including X-rays.

I think that is extremely important in handing down a valued judgemental decision when you are looking at a case that, in this case, has occurred years after the original compensable injury.

Mr. Philip: At what stage did you read this whole file, Dr. McCracken?

Dr. McCracken: I read the file in June of this year.

Mr. Philip: That would be after Dr. D made his report.

Dr. McCracken: Yes, that is correct.

Mr. Philip: If you felt that Dr. D had made his report based on inadequate information, would you not have referred the more adequate information to Dr. D to reconsider?

Mr. Emmink: If I can respond to that, Mr. Philip, there would have been no point, because Dr. McCracken, of course, is not involved in the administration of the claim. The appeal board had made its decision. Dr. McCracken was reviewing it to assist me in my involvement in the process.

Mr. Di Santo: Why did Dr. E refer the patient to Dr. D?

Mr. Emmink: As I understand it, Mr. Di Santo, it was because he was not able to come to grips with, or preferred to have another surgeon address, the problem which was put to him.

Mr. Di Santo: What I would like to know is, was it for the purpose of having a diagnosis, or was it for the purpose of establishing the relationship?

Mr. Emmink: I think it had to do with the relationship.

Mr. Di Santo: It had to do with the relationship? Since it had to do with the relationship--because I think the diagnosis was accepted. Am I right, Dr. McCracken?

Dr. McCracken: Mr. Di Santo, as far as I can determine from the contents in the file, there is no question that this particular person had a ganglion or a cyst on the back of the wrist which was operated on, and also had some condition at the

front of the wrist that had been diagnosed as carpal tunnel syndrome.

Mr. Di Santo: Yes. Would Dr. E, in that case, be reasonable in asking for a specific opinion from Dr. D without supplying the material that would bring Dr. E to express a learned opinion? What is the normal medical practice?

What normally happens if a doctor refers a patient to another doctor asking for a specific opinion? Is it reasonable to expect that you would send all the relevant information to your colleague so that he can express a learned opinion?

Dr. McCracken: So far as I am concerned, yes.

Mr. Di Santo: Yes. Therefore would it be reasonable for lay people like us to expect that the opinion expressed by Dr. D would be the result of not only of his medical knowledge but also of the knowledge of the specific case?

Dr. McCracken: Yes, it would be expected, Mr. Di Santo, that when that particular surgeon examined the patient--and I believe he did examine the patient--his opinion should be based upon the medical data he received, upon his examination findings, including asking the patient pertinent questions, and upon his degree of medical expertise in the field.

Mr. Di Santo: Thank you very much. It is clear to me that Dr. D had all the elements in order to express what we can call an informed opinion. My question is, in these types of cases--I notice from the opinion expressed by Dr. E and Dr. F, Dr. E says there was a period of two years and two months after the incident, and you will correct me if I am wrong, and that would be, in his opinion, the reason why there is no relationship.

Dr. F says that in reading the investigation notes--by the way, does that mean this doctor never examined the patient but read the investigation notes, as opposed to the other medical reports? Let me finish and I will come back to this one--that "there is continuity from one co-worker but no continuity otherwise." So, for Dr. E, the reason is that there was a two year and two month lapse. For Dr. F, it is a lack of continuity.

Can you explain to me in this case--because as Mr. Mitchell and all the other people said, we do not know anything about this disease--what the factors are which can bring a doctor to say that there is a relationship or there is no relationship; it is only the time that passes from the incident until the problem comes to the point that surgery is required or it is continuity. What is it?

3:40 p.m.

Dr. McCracken: Mr. Di Santo, Mr. Chairman, essentially I am of the opinion that upon making inquiry, taking the history from the patient and, I hope, having access to the documentation which is available, one of the key factors in determining a cause-effect relationship is continuity of the problem, be it pain, or recurrences of stiffness, or whatever. If that is

lacking, then that, in conjunction with no need to have ongoing and continuing medical attention, does tend to indicate to me that the original condition which gave rise to the disability has ceased to exist; that is, the person has recovered, which is the goal of the treating physician, of course, and having recovered, then one would not expect future problems to be related to the condition from which the person has recovered.

It is not necessary to have continuity every day and every hour. It is appreciated in certain conditions that a continuity is accepted and can be established if a person has a cyclical type of problem, such as if there is a recurrence every one or two months.

I am sure that in dealing with our compensation cases, you can recollect, especially in back cases, the fact that backs do tend to have this cyclical phenomenon. They really do not fully recover and continue to have flare-ups of their condition. The board accepts and appreciates that. It is not necessary to have it every hour, minute and day. Continuity is an extremely important factor, no question about that.

Mr. Di Santo: In this case, I do not understand the investigation notes, "There is continuity from one co-worker but no continuity otherwise." What does that mean?

Dr. McCracken: My interpretation of that would be that some acquaintance has said, "Yes, so far as I know, this person has continued to have problems." Having said that in the course of investigation carried out in the claim, they apparently were not able to establish continuity of the requirement for ongoing medical care, or ongoing renewal for prescriptions or for ongoing surgery, nor were they able to establish periods of disability where the person in question was unable to work and had lost time from work which was related to the compensable condition. That would be my interpretation.

Mr. Di Santo: That would be the sole basis on which the Dr. F based his opinion, apparently.

Mr. Emmink: Perhaps I can embellish that. When one of our people interviewed her, the lady suggested that as proof of her ongoing problems there were three of her co-workers who were aware of those problems. The board on speaking with them found only one who suggested there was some ongoing problem.

Mr. Di Santo: What does that mean? Does that mean that one is not a credible witness?

Mr. Emmink: It raises in the board's mind the question that if she did have an ongoing problem, how significant was it.

Mr. Chairman: Does it matter how significant it was?

Mr. Emmink: I think it does, yes.

Mr. Chairman: Why?

Mr. Emmink: If there is an ongoing medical problem of

significance, then one would expect that people with whom she worked would be aware of it. One would also expect probably that she would continue to seek medical advice or treatment for it. That was not the case.

Mr. Philip: Do people always discuss their personal medical problems with their co-workers?

Mr. Di Santo: To make a diagnosis of this sort rests on a pretty shaky premise. If they had found three co-workers then Dr. F would have said there is a relationship, is that what you are saying?

Dr. McCracken: If I might, I should point out that both the conditions which have been diagnosed were of such a nature that some significant period of time following the reported injury they both required surgery. The natural history one would expect would be that the person would be having continuity of the problem ultimately leading up to surgery. With the lack of that, then the factor one must consider is, when was the onset of each of these two problems? Was it some time remote from the original compensable accident? From the data in the file it would appear this was the case.

Mr. Chairman: Is this a progressive affliction? Will it continue to get worse over a period of time to the point where it could get to the situation where he or she has to seek medical treatment?

Dr. McCracken: With the ganglion, it is not progressive in the sense that it continues to get worse. The history of a ganglion is that it will fill up with fluid and pop up. The main problem is twofold. One, it is the cosmetic appearance of it which bothers people who have ganglions, because it is an unsightly lump on the back of the wrist; two, when it does fill up with fluid, it will ache. That is the history of a ganglion.

The history of carpal tunnel syndrome is that it is slowly progressive. In some cases, the progression will reach a certain point short of the requirements for surgery, for instance, and will not worsen. There are other cases that will reach that plateau and will gradually start to improve until the symptoms disappear.

There is a third group of cases, broken into two parts, where the symptoms are of such severity or progression that surgery is finally resorted to. I say "finally" because it is generally conceded that this is the type of condition you do not approach lightly as it relates to surgical treatment. It is appreciated there is not 100 per cent success in this type of surgery or this condition.

That is why I break it into two parts. One is that, following surgery, they will recover. The second part is that, following surgery, the surgery has varying degrees of failure and they do not fully recover.

Mr. Di Santo: Would it be, for instance, that the person with carpal tunnel syndrome may have discomfort for a protracted period of time, but not to the point where it provokes very severe pains and requires immediate surgery? Can it be prolonged for a period of time?

Dr. McCracken: Yes. In the mild cases of carpal tunnel syndrome--and, incidentally, it tends to be a disease preponderantly in female patients--the ratio is about five or six to one.

This particular condition can be so mild that surgery is never even considered, and the patient is told: "You are going to have to put up with a bit of discomfort, but in all probability it will disappear. However, if it does continue to bother you, you might have to come back to see me." That is the usual history in the mild cases.

Mr. Di Santo: Can you tell us now, with the knowledge you have today, what type of case we are examining?

Dr. McCracken: The very fact that the orthopaedic surgeon recommended surgery and carried it out within one month following the examination of the patient would indicate to me that this was a rather severe, progressive type of carpal tunnel syndrome where you would expect a lot of complaints, problems and continuity.

Mr. Di Santo: For this orthopaedic surgeon and Dr. D to say that there was a relationship--if I understand correctly what you are saying--amounts to a colossal error. They did not understand, obviously, that if there was a relationship there should have been continuity, and if the case was so severe, perhaps the person should have been operated on much earlier, if it was the result of the accident. Is that not the case?

Dr. McCracken: You have to bear in mind that in these diseases--which go on for a considerable period of time, and in which a specialist enters the picture well down the road from the date of onset, if you will--a significant amount of the evaluation must be based on what the patient tells the doctor.

As I mentioned several minutes ago, just due to the passage of time itself, it is not unusual--and this may, in part, account for differences in medical opinion--for a patient to tell a rather different story to Dr. A, in trying to recount the history of the illness, as compared to Dr. B. It could well be that this might have been--

Mr. Di Santo: But this does not seem to be so in this case.

Dr. McCracken: I do not know.

Mr. Di Santo: It is quite a straightforward situation, from what I read in the file.

Dr. McCracken: I would not be able to arrive at that conclusion.

Mr. Philip: Here again, we are having medical opinions presented that are on one side of the question, without the Ombudsman having a medical consultant to give contrary points of view. This is--

Mr. Bell: He is speaking in general.

Mr. Chairman: Dr. McCracken is responding to questions--

3:50 p.m.

Mr. MacQuarrie: --answers given. What is wrong with that? I think the evidence is valid, whether aspects of it are new

Mr. Chairman: Are there any additional questions from members of the committee?

Mr. Bell: Dr. McCracken and Mr. Emmink, can we get back to this fundamental issue? How does the committee decide which of the two bodies of medical opinion it should prefer?

Dr. McCracken, I would like to get specific with respect to this case for a moment. I understand your explanation of why your in-house, if I may call them that, doctors' opinions are to be preferred. They they have available to them, and I take it it is their practice to review, all the board's file with the relevant data before expressing an opinion. Is that correct?

Mr. McCracken: That is correct.

Mr. Bell: Let us look at Dr. D then. What is it you say Dr. D did not have that he should have had before expressing the opinion he expressed?

Mr. McCracken: I am just looking to see what information that particular physician was sent. It appears he received a copy of Dr. C's report to the board.

Mr. Emmink: Dr. C's report of September 25, 1980.

Mr. Bell: Dr. C?

Mr. Philip: I thought it was Dr. D.

Mr. Bell: I have not got a Dr. C. I do, but I do not know I have.

Mrs. Catton: Dr. C is the orthopaedic specialist to whom the board originally referred the matter.

Mr. Bell: Okay. So he got a copy of Dr. C's what?

Mr. Emmink: His report of September 25, 1980.

Mr. Bell: Who sent him that?

Mr. Emmink: Dr. C.

Mr. Bell: Is there something about that report, Dr. McCracken, that you say is deficient in terms of background data?

Mr. McCracken: It is my opinion that indeed it is deficient in the background data required. I would have concerns about receiving data such as those and being asked to make such a judgemental decision.

Mr. Bell: Did Dr. C have all the board's material made available to him?

Mr. McCracken: I cannot tell you that. I do not know what material he had available to him, whether he had a letter from one of the board surgeons with a synopsis of the history or whether that was accompanied by photostat material.

Mr. Emmink: He had a letter. Dr. C was sent a letter by one of the board's surgical consultants, outlining the history. There is no indication on the copy here whether the file was also sent, but that does not necessarily mean it was not. I believe it is the practice of our surgical consultants when they send a case to an outside doctor to make photocopies of the relevant documentation. That may well go under separate cover.

Mr. Bell: Dr. McCracken, in specific terms, what is it Dr. D did not have that you say he should have had?

Dr. McCracken: He did not have such things as specific dates. I find the report to be very obscure about the relationship between the accident and the surgery for the carpal tunnel syndrome, for instance. I would be very uncomfortable with such background data, especially in view of the fact this particular specialist said he encountered some problem by way of a language barrier when he was attempting to obtain his own history from the patient.

Mr. Bell: That is the second element then. Dr. D did examine this patient, did he not?

Dr. McCracken: Yes, he did.

Mr. Bell: He took a personal history from the patient?

Dr. McCracken: Yes, I presume he did, based upon his report.

Mr. Bell: That notwithstanding, you still believe he did not have all the data he should have had?

Dr. McCracken: It is my opinion that if Dr. D only received a copy of Dr. C's report to the board, that was inadequate.

Mr. Bell: Is that all he received or not?

Dr. McCracken: In so far as I am aware.

Mr. Bell: What did Dr. B not have that he should have had? What do you say, Dr. McCracken? Bear in mind that this is the doctor who operated.

Dr. McCracken: In so far as I can determine from the file, Dr. B, who carried out the surgery for the carpal tunnel syndrome, obtained, one would hope, some information from the family physician--I cannot be certain of that, but I say I hope he did upon referral--and also a history from the patient.

In so far as I can determine, I do not believe the board was asked, nor did the board supply, photostat documentation to this particular surgeon before or, for that matter, during or after the surgery. I could be wrong, but I do not think it did.

Mr. Bell: Have you examined Dr. B's file? Have you made specific inquiries about what information Dr. B had available to him before giving that opinion in September 1981?

Dr. McCracken: I have no idea.

Mr. Bell: Has anybody on behalf of the board asked him what was in his file, what data he had?

Mr. Emmink: He has not been asked that question.

Mr. Bell: How can you then say he did not have sufficient information?

Dr. McCracken: One would expect that if he had had such information, it would have been incorporated in his report, and I believe there is nothing in the report that would suggest he was using that as part of his base of information. Over and above that I would expect there would be a reference in the file either that a letter with photostat information was sent to him at some time or to the photostat information, and again I do not recall seeing anything in the file.

Mr. Bell: What was deficient in the data and information that Dr. A, the family physician, had before giving the opinion he did?

Dr. McCracken: In so far as I can determine, he had only the data that would have been in his own records.

Mr. Bell: Have you examined his records?

Dr. McCracken: No.

Mr. Bell: Do you know what is in the records?

Dr. McCracken: No.

Mr. Bell: Then how can you say it is deficient?

Dr. McCracken: Because there is no evidence in the file that he was supplied with information by the board.

Mr. Bell: How do you know he did not get it from some other source, like the complainant?

Dr. McCracken: That would be part of the history-taking.

Mr. Bell: How do you know he did not get it? How do you know he did not get the very same information that is in your file from another source?

Mr. Emmink: Mr. Bell, that would present us with a difficulty because our files are confidential and, unless we submit that material, we would have a real problem if it were submitted to him.

Mr. Bell: The matters in your file are not exclusive to your file, such as how the accident happened and what the complainant has been suffering from since.

Mr. Emmink: I am sure the doctor had that information; but, for instance, he would not have had copies of the reports, the employer's reports, the memoranda on the file and this sort of thing.

Mr. Bell: Which you say contain some special information not available from any other source?

Mr. Emmink: It is part of the entire data, Mr. Bell.

Mr. Bell: Is it special and is it not available from any other source?

Mr. Emmink: I suppose the doctor could have conducted his own investigation at the plant, for instance, or interviewed people at the plant, but I doubt that he did so.

Mr. Bell: All right. They are the only three doctors the Ombudsman is relying on. I am going to ask you about the second point of your position, that your people are more qualified and experienced than these others, but Mrs. Catton is anxious to make a point, I think, about Dr. D's data.

Mrs. Catton: I wanted to assist the committee. Certainly during the early part of our deliberations of this investigation we wrote a letter specifically to the board asking it why the policy of benefit of the doubt was not applicable, and the board advised us at the time that Dr. A's and Dr. B's reports contained factual inaccuracies. We asked specifically what those factual inaccuracies were, and we were advised by Mr. Emmink that unfortunately Dr. B's report was illegible, so he could not tell us what those inaccuracies were.

We then took it upon ourselves to provide the doctors with the facts as we understood them from the board's files, and after that both doctors supplied us opinions that supported the complainant, which we then forwarded to the board.

4 p.m.

Mr. Bell: Your point is they had the same background and material before they gave their opinion as the board's experts did before they gave theirs?

Mrs. Catton: I would say they have the same facts. I cannot say they had all the same reports, but they had the same sort of facts before them.

The only other point is that Dr. D's letter and extensive report, which goes on for four pages explaining why he thinks there is a relationship, was reviewed by the board's surgical consultant and he found no inaccuracies or missing information. His only concern was that he disagreed because of the time period and that is documented. That was the board's decision as to why his report should not be accepted.

Mr. Bell: Dr. McCracken, with the same three doctors, D, B and A, what is it you say is deficient about their qualifications and experience in giving an opinion on the causal relationship, that is, deficient from the qualifications and experience of the board's consultants, E and F?

Dr. McCracken: Mr. Bell, all I can say is that unless a physician has had considerable exposure in the field of medical-legal work from a medical evaluative standpoint, which is rather far removed from the treatment aspects of disease, or has gained the experience in compensation medicine, most of the physicians are hard pressed really to address themselves to the cause-effect relationship. They are very well equipped to carry out examination, basic history, evaluation, diagnosis and recommended treatment programs, they are the experts in that.

Mr. Bell: Are you saying Dr. D, who was considered to be a more eminent specialist than the original specialist the board retained, particularly lacks some area in this field, either medical-legal or compensation medicine when compared to your specialists?

Dr. McCracken: Mr. Bell, I read the reports to indicate that the orthopaedic surgeon who referred the case to the specialist in rehabilitation medicine was not specifically of the opinion that he was better qualified than himself, but rather that he was unable to come to any conclusion that satisfied him and wanted yet another opinion. That would be the way that I read it.

Mr. Bell: Fair enough, but what is it that is particularly lacking in D's qualifications and experience in assessing causal relationships either from a medical-legal or compensation background. What is it that you say is deficient when compared to your two consultants?

Dr. McCracken: To my knowledge, neither the orthopaedic surgeon nor the specialist in rehabilitation medicine has had any specific training in compensation medicine.

Mr. Bell: That is not my question. My question is qualifications and experience.

You started by saying unless someone who is in practice had some medical-legal experience, and medical-legal just means giving a lot of opinions to lawyers so they can recover moneys or defend an action, unless they have had that type of experience, they do not have the qualifications and experience to give these types of opinions. With that preamble, what is it specifically lacking in these qualifications and experience when compared to your two surgical consultants?

Mr. Emmink: Mr. Bell, may I respond, or try to respond? I think I know what you are getting at.

I think all that Dr. McCracken is saying is that on the one hand, we have doctors who have seen thousands of compensation cases, and among those, there are hundreds perhaps of this particular problem and the causal relationship to work or the absence of a causal relationship. Dr. C and Dr. D did not have that experience. Certainly, they had lots of experience in assessing cases of carpal tunnel syndrome and they had lots of instances where they had to recommend treatment modality, but they did not have lots of instances, as the board's doctors did, of determining whether or not that condition could have developed out of a given set of circumstances in an employment environment.

Mr. Bell: How do you know that? Particularly, how do you know what their qualifications and experience were in that area?

Mr. Emmink: How do I know these doctors have not had that kind of experience in compensation matters?

Mr. Bell: Yes.

Mr. Emmink: They have not worked at the board.

Mr. Bell: Do you know the extent of Dr. D's experience in assessing a causal relationship between an event and a carpal tunnel syndrome in his practice?

Mr. Emmink: No, Mr. Bell.

Mr. Bell: Can you say categorically that he has had very little, some or a lot?

Mr. Emmink: I can satisfy myself, but I do not know what more I can say. I am satisfied that these doctors have not had the same exposure to this kind of work as the board's physicians.

Mr. Bell: I presume that carpal tunnel syndrome is a frequent matter that your people consider. I do not think anybody is going to challenge that you may have looked at more carpal tunnel matters for causation than they have, but you have gone a step further. You have said that frequency automatically implies more competence or qualification.

I am just interested in knowing, and I think the committee is as well, what experience and qualifications in causality

matters, on a relative basis, the three physicians have whom the Ombudsman prefers.

Dr. McCracken: Certainly, Mr. Bell, frequency is one of the criteria used by the medical profession to determine competency. A surgeon who carries out 1,000 surgical procedures is usually deemed to be much more competent in carrying out that procedure than a surgeon who has only carried out four or five.

Mr. Philip: There is no doubt about that.

Interjection: I do not think we are going to debate at what point one reaches a stage where one has a qualification.

Mr. Bell: What were Dr. B's particular qualifications and experience in assessing causal connections between events and the carpal tunnel syndrome?

Mr. Emmink: We do not know what his qualifications are.

Mr. Bell: Do you not know what experience he has had in assessing causal relationships?

Mr. Emmink: We do not know the extent of it, that is certain.

Mr. Bell: You do not know the extent of it at all.

Mr. Emmink: No.

Dr. McCracken: Except we know that he has not been in the environment of compensation medicine at the board.

Mr. Bell: Do you know the nature and extent of the qualifications and experience of the family physician in assessing this type of causation?

Mr. Emmink: I would say none, Mr. Bell.

Mr. Bell: Okay. Perhaps, Mr. Emmink, it is as succinct as you put it. They do not work for the board; therefore, they cannot have as much qualification and experience as our people.

Mr. Emmink: If you delineate between the two fields of medical expertise we are talking about, Mr. Bell, I do not have much of a problem in saying that because of the experience the board's physicians have had in one particular field, they are bound to be more expert than the physicians who are experts in another field.

Mr. Bell: Those are all the questions, Mr. Chairman.

Mr. Chairman: Any questions from the committee? Mr. Emmink, would you like to sum up?

Mr. Emmink: I really have nothing else to add, Mr. Chairman.

Mr. Chairman: Dr. Hill?

Dr. Hill: No, Mr. Chairman. I think the discussion has clarified many things for me. I would like Mrs. Catton to make two points for us, please.

Mrs. Catton: I would just like to clarify two points. In reference to Mr. Philip's comment that we were presenting new evidence to the committee for its consideration, my only purpose in presenting that new item was basically for the picture on page 2, so you would understand things if we got into technical information on what carpal tunnel syndrome is. We were not relying on that to support our complainant in any way, but just to assist the committee.

Regarding a question raised by Mr. Mitchell earlier on, he was concerned, with respect to the newsletter we submitted to you, about why the second surgery had not been conducted and why the complainant had not gone back to work. I would just like to read briefly into the record Dr. C's opinion on the second surgery:

"My clinical impression today is that her significant disability is a form of causalgia associated with her pre-existing carpal tunnel syndrome and aggravated, I think, by a mental state. Whether the carpal tunnel re-release at this stage is likely to significantly help this lady, I do not know. She could well be the sort of patient who, subsequent to further surgery, becomes even worse."

Basically, what has happened is that the second surgery has not been recommended or carried out. That is one of the reasons for an ongoing problem.

4:10 p.m.

Mr. Chairman: Is that it? Thank you. I wonder if, at this point, you would like to summarize your position on the previous case. Mr. Emmink?

Mr. Emmink: Mr. Chairman, the board's position on this case is rather simple. This man undoubtedly had an incident occur at his employment in August 1975. At that time, he had been operated on on two prior occasions. He had a significant pre-existing back disability. On this basis, we allowed the claim on an aggravation basis, as I explained to the committee, for the acute period of disability, which was deemed to have ended when he returned to his regular work.

We even have the family physician saying that in the intervening period between his return to work and the recurrence of problems in 1976, although he had seen the man on several occasions, there had never been any complaint about his back. So we were satisfied he had recovered, and when the back pain recurred in 1976, that was a manifestation of the underlying pre-existing, noncompensable condition.

To lend support to that--and I think I mentioned the operative report earlier--the Ombudsman suggests that if

entitlement were accepted for the 1976 layoff, what would flow from that would include the surgery in 1977. If I can read from the operative report, it said:

"Under general anaesthesia, the patient was prepped and draped in the knee-chest position and the low back approached through longitudinal incision. The paravertebrals reflected off L4-5 and L5-S1. Scarring was noted in both spaces. Utilizing a curette, the scar tissue was removed from the L4-5 space and the lamina approximately and distally was also removed." Then they proceeded to free the nerve root from the scarring.

In the board's view of the surgery that was carried out at that time, the problems that surgery was meant to alleviate, which ostensibly commenced in October 1976, were a continuation of the prior noncompensable surgery carried out in the early 1970s.

That is all I have, Mr. Chairman.

Ms. Bohnen: Mr. Chairman, I would like to respond to a comment Mr. Emmink made earlier in the proceedings about Dr. C's opinion which appears, according to Mr. Emmink, to be based on some misinformation. I think the best way to enable the committee to come to its own opinion on this point is to outline the sequence of correspondence between this office, the board and Dr. C.

Initially, we wrote to Dr. C on September 11, 1980, requesting his opinion. The letter to him outlined the facts in the following terms:

"On August 18, 1975, Mr. K sustained an accident while employed by [the accident's employer]. He slipped from a platform while washing a car and sustained a lumbosacral strain. Benefits continued until November 5, 1975, when it was concluded that Mr. K had reached his pre-accident condition. Mr. K returned to work and was able to carry on until October 7, 1976. On this date, he laid off work due to pain in the low back.

"In an appeal board decision, the Workers' Compensation Board denied Mr. K recognition and entitlement. In their decision, the appeal board noted that Mr. K had sustained two noncompensable accidents which had resulted in operative assaults on his back in 1970 and again in 1973. The appeal board further stated that the claim in 1975 had been allowed on an aggravation basis only and it was considered that Mr. K had reached his pre-accident state on November 5, 1975, the date he returned to work. They concluded Mr. K's layoff of October 1976 and his subsequent surgery in 1977 were not related to the industrial accident of August 18, 1975."

Then there are some more details of the car accident and the noncompensable procedures that were performed in 1972-73:

"It is the view of the board that Mr. K's onset of pain in 1976 and the problems which continue to this day are related to the above-mentioned car accident. Mr. K, however, is emphatic in his view that his back was completely stable before the 1975 accident and that, had it not been for the 1975 accident which

left his back condition vulnerable, and the change of body movements involving bending of his back in 1976, his problems would not exist.

"We then specifically asked his opinion as to whether or not the sequelae of events 'suggest to you that Mr. K's back problems, which initiated in 1976 and which had more recently been treated by yourself, are related to the two car accidents and the resulting surgical interventions or is it your view that the accident at work in 1975 is responsible for the present back problems?'"

I think all the information that Mr. K was relying on and the board's reasons for denying his claim were outlined to the doctor in that letter.

He wrote back on December 1, 1980. This is the full text of his letter:

"You requested whether this patient's present disability was related to his compensable problem. It is my feeling that it is.

"Thank you for your interest in this case."

That letter was forwarded to the board, and Mr. Emmink wrote back on January 28, 1981, saying the letter and report had been referred to the appeal board.

"The panel noted that the doctor does not identify the nature and extent of Mr. K's present disability, nor does he state his understanding of the nature of the compensable problem. He gives no history and his report contains no reasons or other information which might indicate the basis upon which he comes to his conclusion."

That letter was forwarded to the doctor together with a covering letter, saying:

"This will be self-explanatory and the purpose of my writing at this time is to request your indulgence in assisting us with this matter by replying more fully to the issue at hand."

Again, a copy of the original letter giving the details and background was provided to him.

He wrote back on February 24, 1981. I am afraid he does not give an opinion, but he says: "This patient hurt his back August 18, 1975, at work. He has been having difficulty with it ever since. He was treated by another doctor with various...." He talks essentially about his 1977 surgery and about his current--i.e., 1981--position. He does not end the letter with any opinion at all on the point in dispute.

That is the end of the correspondence between this office, the board and the physician in relation to the issue of causation.

I was able to find the letter Mr. Emmink referred to. It is a letter dated December 7, 1981, 11 months later, and it is a copy

of a letter from the same doctor to the family physician. It appears to me from this letter that the man was still having some difficulty. The family physician referred him back to the specialist. In that letter, he says:

"The patient had a compensable accident in January 1969"--which is incorrect--"where he sustained a compression fracture," etc. Then he talks about some other problems he has had, which I do not think are terribly relevant to what we are talking about.

I think that either he was mistaken in December 1981 or he wrote his letter incorrectly. To attribute the same misunderstanding, misinformation or faulty recollection from 10, 11 or 12 months earlier when he gave an opinion on the issue under discussion and when he was given all the information is somewhat speculative.

To sum up, we can tell you he had all the accurate information when he expressed his opinion on the point.

4:20 p.m.

Mr. Chairman: Just for my own clarification, when he talked about a compression fracture, was that the same sort of injury he suffered with the fall off the platform?

Ms. Bohnen: No, it was not.

Mrs. Catton: That was the injury he suffered as a result of the first noncompensable accident.

Ms. Bohnen: I wanted to clarify. Do you want to say a few words?

Mrs. Catton: Just a brief concluding comment. When this case was first considered by the Ombudsman, there were three opinions from orthopaedic surgeons that were well thought out, well reasoned and not simply a comment on a form. Those are the opinions of Drs. A, B and C.

For the committee's own information, we corresponded three different times with Dr. A to ensure that he had all the correct information, and the board's surgical consultant agrees in his memorandum of November 22 that the evidence available to Dr. A was the same evidence that was available to him. So in support of the complaint there is the evidence of three orthopaedic surgeons, and the board relied on two surgical consultants, one with a specialty in orthopaedics, to deny the claim originally.

The matter was then referred to a medical referee after further discussion. The medical referee's report, in our opinion, is not conclusive enough to have the whole case turn on it; we found that this decision was unreasonable. In addition, the original decision was unreasonable, given the weight of evidence in favour of the complainant.

Mr. Chairman: Anything additional, Mr. Emmink, in response?

Mr. Emmink: Just that once again the findings on surgery in 1977 speak for themselves.

Mr. Chairman: Thank you very much.

We are going to adjourn until tomorrow. I suggest that you try to arrive here around 10:15. The committee will be meeting at 10 o'clock in camera until approximately 10:15. We are not going to have an opportunity to deliberate on these cases today. We hope to do so later this week.

The committee adjourned at 4:22 p.m.

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SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
THURSDAY, SEPTEMBER 13, 1984
Morning sitting



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From the Office of the Ombudsman:

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LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Thursday, September 13, 1984

The committee met in camera at 10:15 a.m. in committee room 1.

10:37 a.m.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: We are starting off this morning with recommendation-denied summary 19.

Mr. Bell: Mr. Chairman, if I may make a few observations before we start, this is another of the war-of-the-expert cases, if I may call it that. Again the issue is which of the bodies of medical opinion that each of you rely upon is the preferred one.

Dr. Hill--I feeling like calling you Dr. H--Mrs. Catton and anybody else, these cases are probably the most difficult for this committee to deal with because of the complexities of the evidence. We are very much in your hands in how you set forth your various positions. The detailed summaries and the synopsis are very helpful, as are the reports. I am just reminding you again to take it slowly. Do not feel the pressure of time necessarily; take it slowly and make sure that your position, particularly the reasons for which this medical evidence is the best or the better of the two, is clear so that everybody fully understands what your position is all about.

With that preamble, would you begin, please?

Dr. Hill: Mr. Chairman, Mr. Bell, members of the select committee, this is a brief opening statement on detailed summary 19.

Mr. C suffered an acute back strain at work in July 1974. A psychological problem, or functional overlay, was noted shortly after the accident. Mr. C has received a 15 per cent permanent disability award for his residual back disability. He has not received any benefits for a psychological disability arising from the accident. In my view, the board has acted unreasonably in denying him psychiatric entitlement.

In response to a possible recommendation made by my predecessor, the board agreed to have Mr. C assessed in terms of his psychiatric condition. Dr. A conducted the assessment in 1983 and determined that Mr. C was not psychologically disabled.

I am supporting Mr. C's claim for benefits for his psychological disability from 1975 until 1983, when there was evidence that he was no longer disabled. For the period in question, I share Mr. Morand's opinion that the evidence of Dr. M, Dr. C, Dr. D, Dr. S and Dr. T supports the existence of a psychological disability related to the accident for which Mr. C is entitled to benefits.

Mr. Chairman: Mrs. Catton, do you want to elaborate?

Mrs. Catton: Mr. C suffered two accidents at work, one in 1973 and again in 1974.

Mr. Bell: Your report says three; your summary says two. Maybe you could satisfy yourself as to which number it is.

Mrs. Catton: There were two crucial ones where there was some time off work; two accidents that resulted in permanent disability to be granted by the board for an organic condition.

The question of a psychiatric component to his illness came up shortly after the second accident. As a matter of fact, two weeks after the accident, a neurosurgeon examined him and noticed a functional overlay.

Mr. C continued to receive treatment from a physiatrist, from a general practitioner, and eventually the physiatrist sent him to a psychiatrist, Dr. S, in May 1975 to determine whether there was any psychiatric treatment that would be of assistance.

Dr. S at that time stated: "His pain and disability have resulted in a chronic state of mild to moderate depression. I would think that the depression is not severely disabling, but it relates quite directly to his injury."

That is the basis of the Ombudsman's findings that Mr. C suffered a disabling psychiatric condition related to the accident. That is the clearest piece of psychiatric evidence available to the board and to the Ombudsman.

There is other psychiatric evidence available from Dr. T, who examined Mr. C while he was at the board's hospital and rehabilitation centre. His report is not as clear, but it gives the impression that there was a genuine disability. Let me read it into the record.

"The patient gave the impression of a sincere person who appears genuinely depressed. It is very difficult to ascertain whether the depression has been caused by his back trouble and if and to what extent his emotional condition has contributed to the development and maintenance of his painful condition. However, there seems to be a connection."

The next psychiatric piece of evidence is from Dr. D, who examined him at the request of the complainant's family physician.

Mr. Bell: Can we stop for a moment? Can you give us some indication of the length and frequency of Dr. S's examinations and/or treatments of this gentleman?

Mrs. Catton: He saw the complainant on one occasion and did an assessment.

Mr. Bell: Is there any psychiatrist who has seen this man on a continuous basis for both diagnosis and treatment?

Mrs. Catton: No. The only thing close to treatment that you have is Dr. T, the board's psychiatric consultant, and he recommended some medication, which the family doctor prescribed.

The other evidence is from Dr. D, and there is no quote in the summary. The report goes basically through a history and acknowledges that the man is embarrassed because he is not earning a living and recommends that it would be in his best interest to return to modified employment as quickly as possible. Dr. D diagnosed hysteria. He did not specifically address whether it was related to the accident or the degree of disability.

The final piece of evidence is the report from the board's psychiatric consultant, Dr. K. Dr. K did not examine the patient, but reviewed the file. His report is basically a two-page memo, and the first page and a half goes through the treatment he received from other doctors. He states:

"The above psychiatric assessment indeed suggests a strongly personality-related inadequate adjustment to the post-accident period and unfortunately, as it appears...an attitude in co-operation while in the centre on two occasions indicates that all rehabilitation attempts have failed for reasons only known to the claimant. He professes 'total disability' now while the consensus of opinion is that he should be able to return to a modified employment and that this would be, from a psychiatric standpoint, indeed therapeutic."

The psychiatric consultant then recommended that the board's social worker visit Mr. C at his home. The social worker went out to question the family members as well as Mr. C. Mr. C objected. The social worker reported to Dr. K, who then wrote a very short memo saying he agreed to continue the denial of entitlement to psychiatric benefits.

That was the state of the evidence when the Ombudsman made his original tentative conclusion. At that stage the original appeal board decision was important to read. It is the last assessment document that you have, I think, starting on page 2 of the numbered pages of your binders. If you go to page 3, the board found that Mr. C's emotional condition could not be attributed to the accident of April 30, 1973, and July 18, 1974.

It was the Ombudsman's understanding from that decision that the board had accepted that there was an emotional disability or an emotional condition present. On that basis, Mr. Morand issued a possible conclusion in a section 19(3) letter. He found that the appeal board had acted unreasonably by not relating the disability to the accident. That is important because in workers' compensation claims and for any disability, first, you have to establish the disability and then you have to be able to relate the disability to the work accident. From the decision, Mr. Morand was clearly of the view that the appeal board had accepted that the disability existed.

Mr. Bell: If we read the decision, though, it accepts that an emotional condition existed. Where do they say that a disability existed?

Mrs. Catton: We interpreted that to mean a disability.

Mr. Bell: Why?

Mrs. Catton: It just seemed an appropriate interpretation of the words.

Mr. Bell: Why? I can suffer from an emotional condition, but that does not mean necessarily that I am disabled, although my wife might think otherwise.

Mrs. Catton: There was evidence preceding this period in the file that several board doctors, having reviewed some of the evidence on file, seemed to indicate that a psychiatric disability had been accepted. This is all information contained in the report.

Mr. Bell: All right. Refer the committee to that then, if you will.

Ms. Bohnen: While Mrs. Catton is doing that, I think it is important to read into the record a little bit further from the key psychiatric report which describes the condition of the man and which I think demonstrates his disability.

Mr. Bell: Can we find this anywhere?

10:50 a.m.

Ms. Bohnen: No, you will not. It is not quoted, but it is not very long.

Mr. Van Horne: What time was this?

Ms. Bohnen: This was May 30, 1975. This psychiatrist is Dr. 'S. A little bit of his report is quoted in the synopsis.

Mr. Bell: Members of the committee--just before you get into this, Ms. Bohnen--in either the synopsis or at the third paragraph of page 18 of the material, you will see a more lengthy reference to this doctor's opinion.

Ms. Bohnen: This is Dr. S. He reports that he saw Mr. C on May 1, 1975. At that time, he continued to complain of low back pain and some neck pain. He gave no previous history of any previous psychiatric illness or treatment. His family and interpersonal situation did not seem particularly unusual. Mr. C appears to have a good work history with no major periods of absenteeism due to injury. His attitude towards work seemed positive. He appeared to be a man of normal intelligence. He gave no history of drug or alcohol dependence. His economic status prior to the injury was satisfactory and even at present he seemed to be managing adequately on compensation. In general, Mr. C appeared to be a relatively calm and well integrated individual.

Since the time of his accident, Mr. C has changed his lifestyle a great deal. He mainly remains at home and avoids friends and all social activities. He is not particularly helpful at home and generally stays in bed or sits in his backyard. He

seems somewhat angry about his injury, and although he did not elaborate, I believe he thinks that other people at work were partially responsible for his injury. In all likelihood, he feels that he should not have had to lift such a heavy object. Otherwise, there would seem to be no major psychological factors which would in themselves explain his pain.

I do not want to indulge in repetition, but he sums up by saying that his impression was that Mr. C suffers largely from organic pain with a mild functional overlay, mild to moderate depression, not severely disabling but related directly to the injury. I think the disability is evident in his staying at home, avoiding social contact, staying mainly in bed.

Mr. Philip: The constant use of this term "mild functional overlay"--I am sorry Dr. McCracken is not here for this one question--what exactly does that mean? I get different interpretations depending on whom I am talking to.

Mr. Emmink: Would you like me to respond to that?

Mr. Philip: Would you, please?

Mr. Emmink: "Mild functional overlay" is a term that used to be used with great frequency back in the 1960s and 1970s. It is now considered to be a nonspecific term that has very little, if any, significant meaning.

What it meant in those days was that we had a person with a condition other than a physical or organic condition. That emotional or psychological condition was, in those days, referred to as functional overlay, I suppose because of the reluctance on the part of anyone to say that a person had a psychological problem. It is not used any more or very infrequently. I have not seen it used in many of the current reports.

Mr. Philip: So it can mean anything from anger to depression.

Mr. Emmink: The whole gamut.

Mr. Breithaupt: It is like a nervous breakdown.

Mr. Emmink: Yes. It is like lumbago. Lumbago is a very unspecific term.

Mr. Di Santo: When they say "functional overlay," do they mean that in many cases it is not related to the accident?

Mr. Emmink: Not necessarily. Back in the 1960s and 1970s the board would deal with claims for psychological problems and use terms such as "functional overlay": "Does this man have entitlement for his functional overlay?" It is really synonymous with what we now refer to as a psychological condition or an emotional condition.

Mr. Philip: So it does not necessarily mean resulting from.

Mr. Emmink: No. There is no implicit relationship to anything compensable.

Mr. Philip: So there may be a function or there may not be a function of the accident. Is that what you are saying?

Mr. Emmink: That is absolutely correct.

Mr. Breithaupt: But it has a sort of umbrella effect over his other activities, which may have had some connection, and therefore presumably may acquire some benefit. Is that the result?

Mr. Emmink: I believe it is the case with some psychological disorders that they have an impact on the overall person, but there is nothing about the term "functional" that is of much significance in this.

Mr. Di Santo: But the cases I have must go back to the 1960s, because I have many cases in which functional overlay is related, and invariably when a person has a functional overlay, that is one of the reasons for denying the claim.

Mr. Emmink: I can only report to you from my own experience. When I was an adjudicator working in the claims department back in the late 1960s and early 1970s, that was a catch-all buzzword that was used very commonly to describe emotional conditions. I would not be surprised that some of the files you have may very well contain reports that go back to the 1970s.

Mr. Di Santo: I came to the conclusion as a layman that whenever "functional overlay" was used, the board really meant, "You are not able to work, not because of the accident but because something is wrong with you."

Mr. Emmink: That may have been the case, but it does not necessarily flow that for that reason the person would not have entitlement.

Mr. Di Santo: Statistically, I can tell you that 99 per cent of my cases had no entitlement when there was functional overlay.

Mr. Philip: My experience is that it often is followed by words like "not co-operating."

Mr. Emmink: That may be manifest in some of the cases in which a person is absolutely convinced he is totally disabled and unable to do anything and yet all the medical-clinical testing, both by the board's people and by the attending physician, suggests there is not that physical impediment. Where you have that situation, you have the phrase "functional overlay" and the perception that the person is not willing to co-operate. It may be conscious or subconscious.

Mr. Di Santo: I have a case that is now before the board. So that my colleagues understand, in many cases when people do not co-operate it is not because there is a conscious or

subconscious condition; in many cases it is a cultural thing. This person is very seriously disabled, and for some reason the board gave him a two per cent psychiatric disability, which is just very difficult--

Mr. Emmink: Two?

Mr. Di Santo: Two per cent. It is very difficult to quantify two per cent.

Mr. Emmink: I agree with you.

Mr. Philip: All of us have more than two per cent psychological disability.

Mr. Di Santo: He has now been referred to the head injury unit at the hospital, but before that he was subjected to a socioeconomic evaluation. When the social worker came to the house she created total chaos because she started saying things like: "Why do you not sell your house? Why does your wife not go to work? It would be therapeutic for her if she did." They called me, I went to their house and they were in tears.

Of course, the report I will read in one month will be that he failed to co-operate, but the reason is not that he has a conscious or subconscious condition but that there is a cultural problem and a language problem.

Mr. Breithaupt: And the disruption of his whole life.

Mr. Di Santo: Exactly. That relates directly to this case, because Dr. A says this person failed to co-operate. I would like to know what the conditions and circumstances were when this person failed to co-operate.

Mr. Chairman: Mr. Emmink, I would ask you to respond to that later because the Ombudsman has not finished yet.

Mrs. Catton, have you found what you were looking for? Would you like to carry on, please?

11 a.m.

Mrs. Catton: The original decision to deny psychiatric entitlement was made by the claims review branch, and there is a memo on the board's file written by a claims adjudicator going through the history that gave us an indication the board had accepted that the complainant was disabled but felt the condition was not related. I will refer specifically to a couple of comments the claims adjudicator made to his superiors before the claim was originally denied.

The memo was written for the purposes of the claims review branch, which would have actually denied entitlement, and to the board's surgical consultant for his medical opinion outlining the facts. In that memo, he states specifically:

"From a review of the file, it seems apparent that the claimant's claim was prolonged due to his emotional state of mind.

There has been no psychiatric disability and no psychiatric entitlement dealt with as the claimant has now been seen by a psychiatrist. The first signs of any psychological disability under the claim come from Dr. M's report of August 2, 1974, where he indicates that the claimant may have had a lumbar disc protrusion but in addition there was an overlying anxiety state."

It should be noted that this was two weeks and one day after the accident.

Then he reviews the psychiatric evidence and forms his recommendation.

"From a claims point of view, it seems apparent that this man's psychological problems have predated the claim, but I am not completely satisfied that there is no relationship to the 1973 claim. However, there is no concrete support of evidence to warrant payment of psychiatric impediment under the prior claim."

His focus for recommending the denial of impediment would appear to have been the lack of relationship.

Mr. Van Horne: Hang on a moment. We have been talking about psychological things. Is Dr. M a psychiatrist or a neurosurgeon?

Mrs. Catton: A neurosurgeon.

Mr. Van Horne: I am not sure how qualified neurosurgeons are to give psychiatric assessments. I am not sure we are comparing apples and apples here; this is my point.

Ms. Bohnen: That is why I think Dr. S's report, which is current, is the most valuable, he being a psychiatrist.

Mr. Van Horne: Okay.

Mrs. Catton: It appeared to us, from a review of the file, that the initial reason for denying entitlement was the lack of a relationship, and that was why we interpreted the appeals board decision as we did. Does that assist you, Mr. Bell?

Mr. Chairman: Were you listening, Mr. Bell?

Mr. Bell: No, I am sorry, I was not. This is one of those days.

Mr. Breithaupt: It is an overlay he is getting.

Mr. Bell: Sorry, I was otherwise engaged. Mrs. Catton, you got me. What did you say?

Mrs. Catton: I just went through the evidence of the claims review branch.

Mr. Bell: Yes, I knew that.

Mrs. Catton: Basically, they are saying the first signs of any psychological disability under the claim come from Dr. M's

report, and the claims adjudicator recommended denial of entitlement because of a lack of a relationship.

Mr. Bell: Yes.

Mrs. Catton: That gave us the basis for our interpretation of the appeals board decision.

In response to the section 19(3) letter sent by Mr. Morand-- we are back to that--the board advised us that it was an unfortunate choice of words that they had not acknowledged a compensable psychiatric disability but that they were concerned there was no relationship.

First, they did not feel there was a disability, nor did they feel there was a relationship, because there was no disability. But in response to our section 19(3) letter, they agreed to have the complainant reassessed. That reassessment was conducted in 1983, and at that time Dr. A reviewed the file, interviewed the complainant, and found him not to be depressed and not to have any psychiatric problems.

The Ombudsman in his report concluded, going on the basis of the evidence available originally--basically Dr. S's report, qualified by the other evidence, none of which is clear or directly on point but read in total supports the assumption that there was a functional overlay, a psychiatric disability, some kind of emotional problem contributing to the ongoing disability--that there was sufficient evidence prior to Dr. A's report in 1983 to establish entitlement for a psychiatric condition.

That is basically our position.

Mr. Sheppard: You mentioned an investigator and a social worker. Do you have social workers go out in the field?

Mrs. Catton: The board does. We do not.

Mr. Sheppard: When you were referring a few minutes ago to a social worker, you were referring to the board?

Mrs. Catton: That is right.

Mr. Hennessy: I thought I heard said by both parties yesterday and today, "Is it a mental problem or a physical problem?" They seem to intertwine with one another. What is the conclusion? Does one side say it is a physical problem and the other side say it is a mental problem?

Mrs. Catton: In this case, our position is that the complainant suffered from two disabilities resulting from his accident. One was physical, for which he has been adequately compensated by the board. The other one was an emotional or psychological disability, for which he has not been properly compensated. Does that assist you?

Mr. Hennessy: Can I hear from the other side?

Mr. Emmink: That is basically correct. This man does receive a pension for his remaining physical disability. The position of the board is that although he may have an emotional condition, there is insufficient evidence to establish that it disabled him.

Mr. Hennessy: Your argument is that the emotional condition does not go with the other one. Is that right?

Mr. Emmink: That is correct.

Mr. Hennessy: They are two different things altogether as far as you are concerned. Am I right?

Mr. Emmink: There are two entities that have been raised in this case, one of which the board has accepted and the other it has not accepted.

Mr. Chairman: I gather the Ombudsman accepts the fact that in the assessment by Dr. A he concludes there is no psychiatric disability sufficient to warrant an award. You accept that as of that date onward?

Mrs. Catton: That is right.

Mr. Chairman: Between 1975 and 1983, when you were recommending he receive an award, did the individual undergo any kind of psychiatric treatment during that period?

Mrs. Catton: He saw Dr. D in 1978. He saw a psychiatrist.

Mr. Chairman: But there was no ongoing psychiatric treatment?

Mrs. Catton: There was no ongoing treatment, no.

Mr. Chairman: This is a layman's question, but is it possible in this kind of situation of someone who was assessed in 1975 as having a problem that it can clear up magically over a period of time without him receiving any treatment whatsoever? You are obviously saying it can.

Mrs. Catton: The evidence suggests it can. I am sure psychiatrists and mental health experts would agree that people can get better. The evidence we have suggests that is what happened in this case.

Ms. Bohnen: Lest the concern be, "How could this man have been psychiatrically disabled if he did not receive any treatment for it?" the very last sentence of Dr. S's report says, "Mr. C might benefit from a trial of antidepressant medication, but I doubt if this will be effective in the long run unless something more definitive can be done for his pain."

I do not know whether he received the antidepressant medication, but it is evident the psychiatrist who assessed him did not recommend any ongoing psychiatric treatment, which in the workers' compensation claims I have seen does not seem to be

unusual. There seem to be a number of psychiatrically disabled workers for whom psychiatrists do not recommend therapy.

11:10 a.m.

Mr. Philip: I think the research on this is overwhelming. It clearly indicates in this type of mental illness that often the patient either cures himself or there are other people who can often act as therapists as effectively as the psychiatric profession. We are not talking about a fellow who is schizophrenic or deeply depressed. As Dr. S says, "The depression is not severely disabling." It is not as if we are talking about a very psychologically sick person in this case.

Some psychiatrists do not like to talk about the literature, but actually the cure is often by some of the other professionals. They have as good a record with this type of case, if not better.

Mr. Mitchell: I would just like to get this clear in my own mind. On the synopsis we have, it says Dr. T was the board psychiatric consultant. On the list we have, it just says "psychiatrist." Was he in fact on the board?

Mrs. Catton: Yes.

Mr. Mitchell: Was Dr. S one whom the person in question saw on his own?

Mrs. Catton: That is right.

Mr. Mitchell: He has no relationship to the board?

Mrs. Catton: No.

Mr. Mitchell: What is Dr. D's relationship? Is he again an outside person and not related to the board?

Mrs. Catton: Outside, not related to the board.

Mr. Mitchell: So what we have is Dr. T and Dr. K being the two board people along with an orthopaedic consultant. Is that right?

Mrs. Catton: That is right, plus Dr. A. That comes at the interview summary.

Mr. Mitchell: Oh, yes. Dr. A, Dr. T, Dr. O and Dr. K are the board people.

I am a little puzzled about Dr. K and the way he went about doing his work as the board's psychiatric consultant. As I understand it, he did no psychiatric assessment of the man at all. Is that correct?

Mr. Emmink: That is correct.

Mr. Mitchell: None at all?

Mr. Emmink: None at all.

Mr. Mitchell: Probably at the same time as he was pulling on his right ear and scratching his forehead, he decided the man really did not have the sort of problem that several other doctors had decided he had. Instead, for whatever reasons, I guess, he felt maybe the family was part of the problem, in that he sent out a social worker to visit with and interview the family. Am I correct there?

Mr. Emmink: I think I know the point you are getting at, Mr. Mitchell. If your point is that Dr. K was less than specific in his advice, I would concede that point. I agree.

Mr. Mitchell: Interesting. Thank you very much.

Mr. Lane: I was just wondering if I could get some clarification. It says, "Mr. C refused to co-operate with the board's social worker," and this item was marked "Dr. K." In what way did he do this?

Mrs. Catton: The social worker went to the home, and Mr. C did not want to let her in, nor did he want to have his wife interviewed. He basically turned the social worker away.

Mr. Lane: Was she finally let in? Was the wife interviewed or was she not?

Mrs. Catton: No. She was never let in.

Mr. Van Horne: Going back to Mr. Mitchell's question of a moment ago about Dr. K, is it common practice for people such as Dr. K simply to read over the reports and not actually see the claimant himself?

Mr. Emmink: It used to be at one time. That was the practice that prevailed.

Mr. Van Horne: In fact, that happened here; Dr. K did not see the person.

Mr. Emmink: That is true. He did not see this person.

Mr. Bell: Dr. A, the other doctor whom the board relies upon, is he also a psychiatrist?

Mr. Emmink: Yes.

Mr. Bell: He did not see this complainant either, did he?

Mr. Emmink: Yes, he did. He had a rather lengthy interview.

Mr. Chairman: When Dr. A did see this individual, was there any reason why he did not consider his condition prior to the assessment, as the Ombudsman has pointed out?

Mr. Emmink: He did consider the condition prior to the assessment.

Mr. Chairman: It indicates here that he did not.

Mr. Emmink: Yes. I realize that. The Ombudsman conveyed that concern back to me, and in response to that, I asked Dr. A whether he had considered the period prior to 1983. He was most emphatic in his response that he had.

Mr. Chairman: We are getting ahead of ourselves. Perhaps we should ask you to give your views on this.

Mr. Emmink: I have a brief opening statement.

The question before the committee in this case is reasonably straightforward. It is really this: Does Mr. C have a disabling psychological condition? I submit the emphasis should be on the word "disabling." The board concedes he had a psychological condition, but the mere presence of such a condition does not necessarily establish disability.

The Ombudsman refers to medical evidence which in his view supports his contention that the condition was disabling. He refers to a report from Dr. S in 1975 and a report from Dr. T in 1975. Even if it were accepted that those reports constituted proof of psychological disability, nothing would flow from it because at that time the man was receiving temporary total disability benefits and continued to receive benefits at that level for about another year.

The question then goes to what evidence there might be of a disabling psychological condition from the time those benefits were closed in September 1976.

Mr. Bell: Could you go slowly with those dates?

Mr. Emmink: In September 1976, the temporary total disability benefits were closed.

The only two psychologists or psychiatrists who personally assessed the individual--that would be Dr. D in 1978 and Dr. A in 1983--found absolutely no disabling psychological condition. While Dr. D referred to hysteria, his advice to the man was that he go back to work immediately. Dr. A did not even find hysteria.

In the board's view, entitlement to benefits for disability must be contingent on some evidence of disability. In this case, the board submits that evidence has not been identified.

Mr. Bell: For clarification before the questions, as to the temporary total disability benefits up to September 1976, are you saying the extent of those benefits--I am having difficulty phrasing it. Are you saying that even if he had been assessed for some disability referable to a psychological condition up to that time and was consequently awarded some benefit, it would not have increased the benefits he received?

Mr. Emmink: That is correct. He was getting the maximum he could possibly get at that time.

Mr. Bell: That is a significant point, members of the committee. You might wish to ask Mrs. Catton to comment as to whether it makes any difference on a dollar basis. If it does, it obviously would have an effect on the recommendation.

Mr. Emmink: I believe the Ombudsman is concerned with the period up to 1983.

Mr. Bell: But from 1975.

Mr. Emmink: In 1975, which is when we have the only report that perhaps alludes to disability from a psychiatric standpoint, he was already receiving total disability benefits.

Mr. Bell: As long as we understand that.

Mr. Emmink: The members raised some concerns over the aspect of the alleged failure to co-operate with vocational rehabilitation and with the social worker. If the members wish, I can elaborate on that and perhaps provide more specific particulars.

In June 1978, the social worker attempted to contact Mr. C. I can read from the memorandum covering those attempts.

"Mr. C was difficult to contact, and several phone calls both during the day and in the evening had to be made before he was finally located. Mr. C was suspicious of my proposed visit and did not accept my interpretation of it. His problem, he says, is pain and he states quite categorically that there is 'nothing wrong with his head,' which seems to be his interpretation of the psychiatric consultations he has had.

"He rather reluctantly agreed to my visit, but when I suggested I would like to talk to his wife also, he refused, saying that his claim with the WCB had nothing to do with his wife."

11:20 a.m.

Turning now to the allegations of failure to co-operate with vocational rehabilitation, I can tell the members this: "On December 3, 1977, the undersigned sent this worker a letter indicating my desire to contact him as soon as possible to discuss his case. The writer felt that the time period between the suggested closure date and the present time warranted at least further contact with this worker.

"On December 13, 1977, the undersigned was telephoned by another board employee. This board employee informed the writer that Mr. C had contacted her on this date after receiving my letter. The board employee stated that Mr. C had threatened to kill any counsellor who showed up on his doorstep. In particular, Mr. C threatened to maim a particular part of the present writer's anatomy." It was on the basis of this that the rehabilitation people came to the conclusion that this individual would not likely co-operate in a rehabilitative effort.

Mr. Di Santo: What is the date?

Mr. Emmink: It was 1977.

Mr. Di Santo: His benefits had been cut in 1976?

Mr. Emmink: His benefits at the temporary total disability rate ceased in September 1976 and from that point onward he received permanent disability benefits.

Mr Di Santo: Only the pension of 15 per cent.

Mr. Emmink: That is correct.

Mr. Di Santo: What was the amount of the pension?

Mrs. Catton: It was \$134 a month.

Mr. Emmink: Yes, I believe it was in that neighbourhood.

Mr. Di Santo: Is it conceivable to think that because he was receiving only \$134 a month and he expected to receive more because he felt he was more disabled, that he was very upset with the board and that is why he did not want to see the social worker?

Mr. Emmink: I suppose an individual could be concerned if he receives notification that all of a sudden his income is being reduced substantially, but I think we have to keep in mind that the incident referred to here occurred more a year after his pension had been reduced.

Mr. Di Santo: Exactly, which means that his economic situation had worsened even more.

Mr. Emmink: I think we should also mention that the people who tried to contact him were contacting him for the purpose of trying to assist him.

Mr. Di Santo: That was not the question.

Mr. Chairman: Is this his only source of income now?

Mr. Emmink: I do not know, Mr. Chairman.

Mr. Chairman: He has never returned to work, though?

Mr. Emmink: I have no idea.

Mrs. Catton: No, he has not returned to work.

Mr. Chairman: Mr. Mitchell had a question.

Mr. Mitchell: First off, does the Ombudsman have a copy of that social worker's report, that last one you read where the person threatened to do certain things?

Mrs. Catton: Yes, we do.

Mr. Mitchell: The immediate question that comes to mind, Mr. Emmink, is what would you think if you were to walk into a situation and you should be spoken to in that way? What would your immediate reaction be to the person? I know I am putting you on the spot.

Mr. Emmink: I would suggest that person was not likely to co-operate with anything I might have to suggest or to offer to him.

Mr. Mitchell: The fact of the matter is, when someone reacts that way with someone who is supposedly directed to him to try to assist him, surely to goodness, to most people, even those of us not skilled in the art of evaluating the mental outlook of people, that would indicate there is something drastically wrong with this person.

Mr. Emmink: The board has never denied that Mr. C has an emotional problem, or had an emotional problem.

Mr. Mitchell: You have never denied that?

Mr. Emmink: Absolutely not. We concede that there was an emotional problem there. The problem the board has is in taking the emotional problem and from there saying that problem is of sufficient magnitude to disable the individual. This is where we feel the evidence is deficient. Again, the Ombudsman has alluded to evidence that might suggest that. The evidence suggests he has a mild condition which is not severely disabling, but that evidence relates to a period of time when he was receiving total disability benefits.

Mr. Mitchell: But the board, as I understand what you said, is not denying there is some emotional problem?

Mr. Emmink: We do not deny that there was an emotional problem. There is no longer one, to the best of our knowledge.

Mr. Mitchell: Then are you disputing what Mrs. Catton said earlier, that now if the man leaves his bed it is to sit in the yard, but he does not go out and he does not do a variety of other things?

Mr. Emmink: No. I think what the Ombudsman has conceded is that he is satisfied that, I believe as of February 1983, there is no longer an emotional problem.

Mr. Mitchell: I know that is the recommendation. I accept that.

Mr. Hennessy: Just to follow up on that question, as Mr. Mitchell has mentioned, Dr. K made no mention of a problem of that nature, but you, who are not a medical person, have come out and said he has an emotional problem. I find that a little difficult. I depend on the evidence of the doctor when I am making a decision. You come out and say the man has an emotional problem, but the doctor did not even look for an emotional problem.

Mr. Emmink: Mr. Hennessy, Dr. K does say in his report that the assessment suggests a strongly personality-related inadequate adjustment to the post-accident period. I submit that really says in simple language that he has an emotional problem.

Mr. Hennessy: I do not want to disagree with you, but Mr. Mitchell, who is the parliamentary assistant to the Minister of Health (Mr. Norton), has a better knowledge of health problems than I have, and his questions were a lot different. I do not think the doctor did his job, and Mr. Mitchell has said that.

Mr. Emmink: I have conceded that Dr. K, in terms of the problem facing the board--that is, does this man have a disabling psychological condition--is less than specific.

Mr. Hennessy: The way the initials are, this is like a James Bond movie.

Mr. Chairman: I would like to direct a question to Mrs. Catton or Dr. Hill. We talked about Dr. D in looking at the issues we dealt with yesterday in regard to the numbers of doctors and experts and specialists brought into the cases. I gather you brought in Dr. D. Did you ask for the opinion of Dr. D?

Mrs. Catton: No. He was--

Mr. Chairman: Just an independent--

Mrs. Catton: That is right. The family physician referred the complainant to Dr. D. He changed family physicians and the new family physician felt there was an ongoing problem, so he referred the man to a psychiatrist.

Mr. Chairman: When were you made aware of Dr. D's assessment?

Mrs. Catton: We knew it at the time.

Mr. Chairman: Did it not cause you some concern in your views on this when Dr. D said he diagnosed hysteria and encouraged the individual to return to work as soon as possible? You were contending he should be receiving an award up until 1983. There was an assessment by a psychiatrist that he should return to work immediately, which mentioned hysteria and did not mention any disability. I am wondering why at that juncture you did not bring in another expert on your own to carry out another assessment.

Ms. Bohnen: If I could speak to that, Mr. Chairman, I was going to raise the reports of Dr. D and Dr. M, and the dates of them, as evidence of the continuing psychiatric disability. First of all, in terms of time, it is actually Dr. M who comes first.

Mr. Chairman: He is a neurosurgeon?

Ms. Bohnen: Yes, he is a neurosurgeon who saw the man on October 24, 1977. He was not primarily addressing any psychiatric condition, but he did say after examination: "I doubt whether

psychiatric assistance will be of any benefit here. I also doubt this man's motivation." You could infer from that that he had a psychiatric problem, but this doctor does not believe any assistance is going to do any good.

Mr. Chairman: How much weight can we attach to that?

11:30 a.m.

Ms. Bohnen: I am bringing it to the attention of the committee members and they can draw their own inferences from it. Dr. D's report is dated January 25, 1978, and he describes the man's pain and so forth. He says he will not dwell on the man's past, but then says the diagnosis is hysteria.

He goes on to say: "I believe Mr. C should be encouraged to return to an occupation at the earliest possible time. This will be a very difficult endeavour indeed. It is possible that the embarrassment which he talks about, caused by the fact that his wife has to support him, may be a motivation for Mr. C to return to a remunerative occupation." He goes on to suggest that Largactil, which I believe is an anti-depressant medication, could be tried with him.

It is true that Dr. D suggested the therapeutic measure that the man be encouraged to go back to work, but if you are not too impressed by Dr. M's report from 1977, at least Dr. D's report in 1978 shows that this man has a psychiatric problem, which in the case of a man--he had nothing before the accident--who was easily able to work and had a good work record, is evidence of a continuing psychiatric disability.

Mr. Chairman: You still have not answered my specific question. In the other cases we have dealt with, you have not held back at all in terms of bringing in someone to confirm your original concerns. We had Dr. A back in 1975, and now we are talking about 1978. It seems to me that once you received Dr. D's assessment, which is kind of fuzzy at best, you would have brought someone in to either confirm or shoot holes in your position.

Mrs. Catton: We began our investigation of this complaint in February 1981. This complaint gets gets confusing because it is one of the old cases that was reopened and closed, but when we were investigating the question of psychiatric entitlement, it was already several years after 1978. We thought about hiring an outside specialist to do an assessment, but we did not know what a psychiatrist could tell us years later about a condition from 1976 on. It was at least four years after 1976, the time when benefits stopped, and we did not think that an additional psychiatric opinion at that time would be of benefit to answer the question of whether he was disabled in 1977 and was he disabled in 1978 because conditions change, especially psychiatric conditions.

Mr. Chairman: So you did not get involved with this again until 1982.

Mrs. Catton: Yes, January 1982.

Mr. Bell: Ms. Bohnen, the only place in the Ombudsman's report where Dr. M is referred to is in his July 1974 opinion. That is at the top of page 2 of the report. I guess we are entitled to presume the October 1977 report that you read was not considered to be helpful.

Ms. Bohnen: I raised it because Mr. Emmink made the point that, however strong Dr. S's medical report is, it speaks to a time when the man was receiving total benefits, and Mr. Emmink argued there was no evidence during 1977 and 1978 that the man continued to have a psychiatric disability, so I brought to your attention a neurosurgeon's report in 1977 that I thought at least implied a psychiatric disability, and a 1978 report that I maintain does imply a psychiatric disability. I am addressing a particular problem which Mr. Emmink has raised today.

Mrs. Catton: The other point to note is that Dr. M's opinion has remained consistent. Since he began treating the complainant in 1974, his diagnoses have been pretty well consistent. There are several other reports from Dr. M in your file, but they are basically consistent.

Mr. Bell: It does not sound consistent, at least from the part that Ms. Bohnen read, in terms of the man exhibiting any symptoms in 1977 which are of the type described and documented in reports and opinions of Dr. S and Dr. T.

Mrs. Catton: I am saying that Dr. M's assessment of the condition has been fairly consistent. He was there primarily to assess the organic disability; he noted a functional overlay in the beginning and he continued to comment on that problem all the way through between 1974 and 1977.

Ms. Bohnen: Mr. Bell, I think this illustrates the hazard of just picking a couple of sentences out of the medical report. If you do not mind, I will just read more from the October 24, 1977, report of Dr. M, which I think shows that there is really no change in his description of this man.

"I saw Mr. C again on October 24, 1977. This man says he has pain all over. This includes his low back, his legs, his neck, his arms. He says that when he gets a cold draught on him, he gets so much pain he can hardly move.

"He was hospitalized and a complete myelogram was carried out and this was negative. An epidural hemogram was then done in May of 1976 and this was normal as well.

"This man has been out to the compensation board hospital, and it was felt that he was suffering a lumbo-sacral and cervical strain and anxiety depression. His examination today really is not very revealing. There is limited back movement. He is not particularly tender in his cervical and lumbar spine. His pylo reflexes and sensation are normal.

"I doubt whether psychiatric assistance will be of any benefit here. I also doubt this man's motivation. He wonders in his own mind whether he has some sort of rheumatism or arthritis

to give him all these pains, and I think it might be helpful to have his seen by a specialist in arthritis. I doubt that this will be of any assistance to us, either."

Mr. Bell: Just stop for a moment. Where, in any part that you just read, does he give an opinion that the man exhibits psychological symptoms?

Ms. Bohnen: He does not say that in the terms you are using, but I think he is painting a picture of a man who is extremely unwell and who we know is only marginally organically disabled.

Mr. Bell: The only thing he says in that is at the beginning, "It is said that he suffers from some anxiety state."

Ms. Bohnen: You are misquoting. He says, "The man has been out to the compensation board hospital, and it was felt that he was suffering...anxiety depression."

Mr. Bell: "It was felt."

Mrs. Catton: That was the diagnosis on discharge.

Ms. Bohnen: But I think, Mr. Bell, with respect, you are expecting this doctor at the time to make a clear statement about psychiatric disability in terms that it is unreasonable to expect.

Mr. Bell: No. The issue Mr. Emmink raised is that the evidence of this man's psychological disability ceases before his temporary total disability benefits were cut off and that for the remaining period up to February 1983 there is absolutely no evidence. That is what I thought you were reading in.

Ms. Bohnen: I disagree with you on that. You know we have a man who has a limited organic disability. He is seen by a neurosurgeon in 1977, who describes a considerably unwell man for whom he says he doubts that psychiatric assistance will help him. We have a report in 1978 from Dr. D, diagnosing hysteria and recommending as a therapeutic measure that he get back to work but acknowledging that this is going to be very difficult for him. I am sorry, but I think when you read those reports in the context of this case there is evidence that he continued to be psychiatrically disabled.

Mr. Chairman: Mr. Emmink, in 1978 after Dr. D's comment about hysteria, the Ombudsman suggests this did indicate to him continuing disability; but you said no, it is a continuing emotional condition, in your view.

Mr. Emmink: Yes.

Mr. Chairman: What prompted you to have Dr. K get involved during that same year? Was it that report?

Mr. Emmink: I believe it was at about that time that the matter was being raised with the appeal board, and I believe the appeal board suggested that Dr. K review the situation. The fact

that Dr. D's report was there was coincidental; it happened to come in at that time.

Mr. Chairman: So you did not see Dr. D's position at that time as supporting this claimant's position.

Mr. Emmink: No, particularly in view of the fact that he was saying the man should go back to work, which is what the board had basically been saying for some time.

11:40 a.m.

Mr. Philip: Let me ask about Dr. D's diagnosis of hysteria and then the recommendation that he go back to work. In layman's terms that means the guy was up tight but was still capable of working. Is that not correct, Mrs. Catton?

Mrs. Catton: I am sorry. Could you repeat the question?

Mr. Philip: The diagnosis was hysteria and it was recommended that he be encouraged to return to work. That is Dr. D. What he is saying is that the man is up tight about the whole thing, which is normal after any kind of accident, I would suspect, but he is not disabled, so he can go back to work.

Mrs. Catton: We did not interpret it that way. We read the report to suggest that it would be of benefit to him to return to work, but that did not say he was capable. Certainly, it would be helpful to him if he tried to return to work.

Mr. Philip: Why would he encourage him to go back to work if, as you imply, he may not have been capable of returning to work?

Mrs. Catton: Our position is that the man has never been totally disabled, notwithstanding his own opinion. None of the medical evidence suggested that he was totally disabled, but that his psychological condition contributed to a partial disability which has continued over the years. Therefore, encouraging somebody to return to work might very well be encouraging him to return to modified work when he was engaged in heavy work--he was a cement finisher, I believe--prior to this injury.

From what I understand, the pain that he was experiencing was not organically based and the limitations of his ability to work or to return to work as a cement finisher were not simply because of the organic problem, but also because of an emotional problem. Dr. T, in his earlier report, could not decide what was worse or what caused what: did the psychological condition cause the pain or did the pain cause the psychological condition? The pain he was experiencing was amplified and was limiting his ability to return to work.

Mr. Philip: At the time Dr. T made that diagnosis, did the board assist or attempt to assist him to find some kind of work or modified work?

Mr. Emmink: I believe that was approximately the time

when the rehabilitation counsellor was threatened with bodily harm.

Ms. Bohnen: Mr. Philip, someone who has an organic disability is nevertheless encouraged and expected to get back to work. His ability, with some difficulty, to do that is not taken as an indication that he does not suffer the disability. I am not sure why the fact that it would be possible and even good for him to go back to work refutes the existence of a limited psychiatric disability.

Mr. Philip: Surely, though, the question is whether that psychiatric disability is of such import that he is incapable of returning to work.

Mrs. Catton: He does not have to be incapable of returning to exactly the same job, but to complete work. You could be incapable of returning to modified work.

Mr. Philip: Let me go at it again. Surely the issue is whether the psychiatric disability was of such an extent that it made him disabled or unable to work.

Mrs. Catton: To some degree.

Ms. Bohnen: To some degree, or perhaps impaired.

Mr. Philip: I find nothing in his behaviour, even the description of his getting angry with the guy who came to his door--that may well be the function of a guy who is frustrated but not necessarily mentally ill or mentally disabled in any way.

I have constituents who throw civil servants out all the time, but they are not necessarily mentally ill or disabled. I blew up at the Ministry of Consumer and Commercial Relations people yesterday in a meeting, but that does not mean I am mentally disabled, although some people may have a dissenting opinion on that.

I am just trying to seek your help. I do not find anything in any of these medical reports that really indicates strongly to me that this man was psychologically--I think you used the word "sick"--disabled to the point where his work was impaired.

Mrs. Catton: The only thing I can directly assist you with is that Mr. C has consistently complained about numerous pains and significant pain radiating into all parts of his body--his arms, his legs and his back. That pain, in itself, can be debilitating. The question is, where does that pain come from? Some of that pain comes from legitimate organic problems in the neck and in the lower back, but some of that pain can also be attributed to his reaction to the accidents.

Mr. Bell: Where is that stated in any medical report?

Mrs. Catton: In his report of December 1975, Dr. T said, "It is very difficult to ascertain whether the depression has been caused by his back trouble, and if and to what extent his emotional conditions have contributed to the development and

maintenance of his painful condition." He is stating that the painful condition is in part--he cannot decide completely--related to an emotional problem.

Mr. Bell: Is that what you read into that sentence, Mrs. Catton?

Mrs. Catton: That is what he said.

Mr. Bell: He says it is very difficult to ascertain whether the depression has been caused by the organic, and if and to what extent his emotional condition has contributed. He is just saying it is very difficult. I do not see any finding there of any portion of the pain to the emotional condition.

Mrs. Catton: To what extent--

Mr. Di Santo: It does not mean that the condition does not exist. It is a problem with the diagnosis that the condition exists or may exist.

Mr. Bell: I do not think anybody disputes that.

Mrs. Catton: Let us read this sentence taking out one of the clauses. "It is very difficult to ascertain whether the depression has been caused by his back trouble..."

Mr. Bell: Right.

Mrs. Catton: If you read the same sentence, "It is very difficult to ascertain...to what extent his emotional condition has contributed to the development and maintenance of his painful condition."

Mr. Bell: You left out one big word, the biggest word in the English language, "if." I know we are playing with words here.

Mrs. Catton: He is saying "if and to what extent."

Mr. Bell: "It is very difficult to ascertain...if..."

Mrs. Catton: It is very difficult for him to do.

Mr. Di Santo: Can you read it again?

Mrs. Catton: It is quoted in the summary. Is this question not quoted in the summary?

Mr. Bell: I do not know. I am looking at the section 22(3) report, and you can break the sentence up in two, but you still have to wrestle with the word "if."

Mr. Breithaupt: Which applies to both.

Mr. Bell: With the word "if," any way you want to talk about balance of probabilities, possibilities or likelihoods, but--

Ms. Bohnen Mr. Bell, by the time Dr. D sees him in 1978,

the first long paragraph of his report talks about all the man's aches and pains, pulsations, weakness, etc. We know by then he has a minimal organic disability, yet you have a man who claims to be virtually disabled by his pain. Then the doctor goes on to say that he suffers from hysteria, a psychiatric condition. Do you not infer from this that it is the hysteria which accounts for all these aches and pains that cannot be accounted for by his organic condition?

Mr. Bell: I do not know.

Ms. Bohnen: I think you do.

11:50 a.m.

Mr. Bell: That does not surprise me.

Let me get into one issue. The issue is disability. They do not argue with you that a man was suffering. In fact, I do not even think they strenuously argue with you that between 1976 and 1983 he was suffering from some emotional problem. We can stretch and wind these words all we want. The fact of the matter is, on balance, he probably had some emotional problem. How was he disabled by that problem?

Mrs. Catton: He was disabled by an increased amount of pain which prevented him from returning to some employment.

Mr. Bell: You say the increase was caused by the emotional side rather than the organic side.

Mrs. Catton: No, we are saying both things. He had pain because of the organic problem and that pain was increased by his emotional reaction to that organic problem and the injuries.

Mr. Bell: Okay. I do not have anything further to say.

Mr. Chairman: Are there any additional questions from the members of the committee?

Mr. Di Santo: Yes. I would like to ask the board a question. How do you define "hysteria" in layman's language so Mr. Hennessy and I understand it?

Mr. Emmink: You have me at a disadvantage, Mr. Di Santo. I do not know what the definition of "hysteria" is.

Mr. Di Santo: Okay. If I understand correctly, the position of the board is that even if there was a disabling psychiatric condition in 1975, in 1978 it certainly was not there.

Mr. Emmink: That is true.

Mr. Di Santo: If there was a disabling condition in 1975, and we have two reports here, how can you decide this person should not be compensated at all? Personal common sense might say: "This person was disabled psychiatrically in 1975. Let us see when that condition ceased."

Mr. Emmink: Yes. Your point is well taken, Mr. Di Santo.

In 1975, as you have suggested, there were two psychiatric reports. There was one from Dr. S in May 1975 which suggests there is a mild condition and it is not severely disabling. Then we had the other psychiatric report in 1975 from Dr. T, who does not say in his report that the man has a disabling psychiatric condition. He has a psychiatric condition, but Dr. T does not go as far to say that it is disabling. By December 1975, the condition which may or may not have been disabling in May is not disabling.

Mr. Di Santo: He does not say. Does he say it is not disabling?

Mr. Emmink: He does not say he is disabled.

Mr. Di Santo: He says, "It is difficult to assess if and to what extent his depression contributed to his painful condition."

Mr. Emmink: That is right.

Mr. Di Santo: "However, there seems to be a connection."

Mr. Emmink: That is right. He does not speak to disability and it has been my experience, and I have seen many reports from this particular doctor, that where he finds there is disability, he will comment to that effect.

Mr. Di Santo: The way I read this report is that--we are at a disadvantage and I am sorry Dr. (inaudible) is not here today. In your opinion, was it the painful condition, whatever it is, that was the disabling condition?

Mr. Emmink: I can only be guided by the psychiatric reports, Mr. Di Santo.

Mr. Di Santo: We have a person--

Mr. Chairman: Mr. Di Santo, I am going to have to break in here. I think there was an agreement yesterday that we would break for lunch at 11:55 a.m. so members could attend the special ceremony for our Olympic athletes which starts at noon hour. We can continue the questioning at two o'clock. We will hope for a two o'clock start.

Dr. Hill: There will be closing statements at that time.

Mr. Chairman: Yes. We will break for lunch. Thank you.

The committee recessed at 11:55 a.m.

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Government
Publications

SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
THURSDAY, SEPTEMBER 13, 1984
Afternoon sitting



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Madisso, M., Research Officer, Legislative Research Service

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations
Catton, N., Assistant Director, Special Services
Hill, Dr. D. G., Ombudsman

From the Workers' Compensation Board:

Emmink, A., Assistant Secretary of the Board
McCracken, Dr. W. J., Medical Consultant, Appeals

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, September 13, 1984

The committee resumed at 2:08 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: I see a quorum. We are dealing with detailed summary 19. We were still in the questioning phase when we broke for lunch. Do members have any additional questions they would like to pose before the parties sum up?

Mr. Emmink: I have very few comments in the way of a closing statement, Mr. Chairman. I think what the committee may concentrate on in deliberating this case is the question of whether or not the board's decision in this case was so far afield as to be unreasonable.

The Ombudsman has said that the board's decision was unreasonable, and you have examined the evidence that the board had before it. The board submits that it was not an unreasonable decision.

I also have a little bit of a misgiving in the Ombudsman's relying on the report of a neurologist in a matter that is psychiatric. The Ombudsman has expressed concern over the board doing this in other cases. I think if that concern is valid when the board does it, it should be equally valid when the Ombudsman does it.

Having said that, I feel that the issue here, the question of whether or not this man had a disabling psychiatric problem, is adequately addressed by the evidence and I submit that the evidence is not sufficient to establish that.

Dr. Hill: Mr. Chairman, my concluding statement consists of the following: A rather minute review of the medical evidence and opinions in this case has demonstrated to my satisfaction that Mr. C's claim should be supported. There is a definitive psychiatric opinion in 1975 saying that this worker, who was previously well, had a moderate psychiatric disability.

Medical opinions in 1977 and medical opinions in 1978 continued to paint a picture of a man who was experiencing far more body symptoms than his organic disability could account for. The fact that all the psychiatrists could prescribe for him was drug therapy and an attempt to return to work suggests to me the intractability of his condition, not that he was not disabled by it. He has never returned to work. I hope you will draw reasonable inferences from the available medical evidence and not disentitle this worker because a higher standard of proof cannot be met.

Mr. Chairman: Thank you. Is there anything additional on

this case from members of the committee before we move on?

Mr. Sheppard: Mr. Chairman, is it is still hard for me to come to a decision with so many psychiatrists having different opinions and suggestions. I will leave it at that and mull it over until the time comes.

Mr. Chairman: The next case we are going to be dealing with is the special report of the Ombudsman dealing with the board. That is in volume I of your binders.

Mr. Bell: Mr. Chairman and members, I believe in tab C of volume I there are two groups of material. The first is the special report itself, in the form Dr. Hill tabled it in the House. I would like you to flip right past that and go to the material that has been provided by his office subsequent to the tabling.

The first page we should start with is labelled "Key to Report on Mr. N." You can see that all the parties are designated by alphabet with their designations. We are closer to completing the alphabet in this case than we have ever been. That page is followed by seven pages of what is entitled, "A Chronology of the Report." It is really the synopsis and, as with the other cases, you can fairly spend most of your time assessing and reviewing matters from that source.

I keep saying this with every case we meet, but this case is arguably the most difficult case we have ever dealt with in terms of a fact situation and an application of, again, two sets of medical evidence. There are about five issues you may wish to address principally, one issue being the exact nature of the job function the individual was performing. As for the other issues, I am confident Mrs. Catton and Mr. Emmink will deal with them.

More than with any of the other cases, Dr. Hill, Mrs. Catton and Mr. Emmink, would you be very deliberate in taking the committee through these issues to ensure there is a full understanding of your position. With that, Dr. Hill, could you proceed?

Mr. Emmink: I am sorry to interrupt. Did you refer to a seven-page chronology? Is this the summary that the board and the Ombudsman have agreed on beforehand?

Mr. Bell: Yes, it is the last two pages starting, "Additional Board Comments," pages 6 and 7.

Mr. Emmink: I have only four pages in mine.

Dr. Hill: I am sorry, we have a full statement for him here. Two pages were missing.

Mr. Bell: Mr. Emmink, I do not believe you will see anything you have not seen before in the additional three pages, since two of those pages are your comments. Maybe you could take some time while Dr. Hill and Mrs. Catton are reviewing it. If you need more time after that, tell us. Time could be allotted to you.

Mr. Emmink: Could I have a minute to look it over?

Mr. Bell: Take your time now. I will wait.

Mr. Emmink: Rather than taking up any more of the committee's time, I will try to deal with this as we go through it. If there is anything I have a concern about, I can bring it to the committee's attention at that time. Would that be appropriate?

Mr. Bell: Sure. If you want an additional period after Dr. Hill and Mrs. Catton have finished, by all means ask for it.

Dr. Hill: Mr. N. suffered a stroke at work, which left him permanently and totally disabled. In his claim to the board, Mr. N. argued that the stressful nature of his work on a car assembly line precipitated the stroke. The board's appeal adjudicator allowed the claim. The appeal board, however, accepted the employer's submission and determined that Mr. N's work was not unusually stressful. The claim was then denied.

In reaching my decision in this case, I reviewed the evidence concerning the nature of the work from the various sources, including co-workers and representatives of the employer. Every 60 seconds, Mr. N. was required to read a teletype on the car window and place about 11 different option packages in the cars moving along the assembly line. In my review of the descriptions, I concluded that this job was stressful.

In supporting this complaint, I have relied on the evidence of doctors A, B, and C, which in my view outweighed the evidence of Dr. D, the cardiologist retained by the board. Finally, it is important to the committee when deliberating on this case to remember that there is no conclusive scientific standard to establish the level of stress in a given situation. Therefore, the decision in such a case should be based on the best evidence available, which is the opinion of the doctors. To suggest that entitlement cannot be granted unless there is a confirmed scientific relationship, is in my opinion an unreasonable position.

Mrs. Catton: Mr. N. had worked for an automobile manufacturer since 1972. As you can read on the summary, on April 19, 1978, he suffered a stroke at work. The evidence concerning the job--and I can read the job description available to the board at the time of the appeals adjudicator hearing or I can describe the job from that evidence. What would members prefer? Would you prefer me to read the job description from the transcripts?

Mr. Chairman: Do you feel it is relevant?

Mrs. Catton: The job description is very relevant. What we have to determine first is whether the job was stressful and then how the medical evidence related that stress to the stroke he suffered.

2:20 p.m.

Mr. Bell: Whether you read from documents or give the board a summary of what your office has concluded as to the

essential ingredients of that job, it does not matter to the committee as long as it fully understands what you say that job entailed.

Mr. Emmink: If it would assist the committee, the board does not dispute the job description. The board agrees that the man did what he said he did.

Mrs. Catton: It is important for the committee to know what he did. Why do I not describe the job? If you need further clarification, we can go to the transcripts.

In a space about the size of this room, Mr. N was required to take options. There would be bins around each side of the room, and the assembly line went down the middle of the room. The cars went down the assembly line at 59 cars per hour, approximately one car per minute. He would read a teletype--take into his hand a teletype similar to these--and determine what options would have to be placed in the trunk of the car, to be installed by the dealer later.

Mr. Philip: May I take a look at the teletype? Is that a reproduction of it?

Mrs. Catton: This is similar to the teletype. It has the same coding system, but it is not absolutely identical. The actual teletype at the time of his accident was slightly smaller, but it is exactly the same in coding. I can distribute these to the committee.

Mr. Philip: Do the green highlighted parts indicate what he had to put in?

Mrs. Catton: The green highlighted part is the form. The black printing--he had to decipher these codes and determine what option that code was.

Mr. Philip: Are the codes by number or item?

Mrs. Catton: By number.

Mr. Philip: So 1A means a certain type of widget, then.

Mrs. Catton: That is right. I have copies for the committee.

He would take the teletype off the car and carry it with him. He would go from bin to bin collecting the necessary options. He would put in hubcaps, or wheel covers, as they are now called, but there is not just one type. He would have to decide, from the teletype, the exact type of wheel cover--if it were a wire one or not--or the colour of the floor mats. He would have to decipher that from the coding on these teletype sheets.

Mr. Bell: While the committee members have this document in front of them, his job responsibility included ensuring that the appropriate options were placed with the car at that point on the assembly line. Did he deal only with certain categories of

options? I mean, was he a wheel man?

Mrs. Catton: No. He dealt with the options to be installed by the dealer when they sent the car out. He would include floor mats, aerials, a special extension valve for certain kinds of tires, hubcaps--

Mr. Bell: Hold on. These pulley spans, power steering, engines, drive belts, mouldings, and so on, are categories of the car. How many of these categories included options for him to have regard to?

Mrs. Catton: Approximately 11.

Mr. Mitchell: May I interject? There are two figures used in this documentation, 11 and 16. One of the people appearing before the board or giving testimony said 16.

Mrs. Catton: At the appeals tribunal, the union representative indicated that it was 11. I understand that it was up to a possible 16, but usually around 11.

Mr. Bell: It will assist committee members if they understand what he did. Then we will move off this topic. With any given car, I assume there are some options called for. How were the options highlighted?

Mrs. Catton: By the code.

Mr. Bell: By these numbers we see which were written by some kind of a word processor?

Mrs. Catton: That is right.

Mr. Bell: He would then identify what options were available, and I guess the easiest situation...

Mrs. Catton: That is right.

Mr. Bell: He would then identify what options were available and I guess the easiest situation would be if he saw only one option.

Mrs. Catton: That is right.

Mr. Bell: He would then get that option from somewhere in his vicinity?

Mr. Catton: The bins would be along this side of the wall and along that side of the wall and the line went down the middle, so the power would be coming down the line.

Mr. Bell: So the easiest situation is that he would identify the single option, go and get it and put it somewhere in the car?

Mrs. Catton: That is right, but there--

Mr. Bell: The most difficult situation would be where he identified 11 options and had to get them and put them in the car all within the allotted 59 seconds.

Mrs. Catton: Sixty seconds.

Mr. Bell: Or one minute, so many seconds.

Mr. Philip: Are you also saying tires were part of that?

Mrs. Catton: No.

Mr. Philip: It would be just the hubcaps.

Mrs. Catton: The hubcaps.

Mr. Bell: Is there any evidence as to what the general average of options were for this man's job?

Mrs. Catton: There is no specific evidence to that point. There is some evidence that there is a minimum of five options usually per car.

Mr. Mitchell: Since you are talking about the options, I am looking at this sheet and to me it does not make much sense. I do not see where there are many options that could be picked up and put in the trunk of the car from this. I see engine, transmission, power steering, catalytic converter, that sort of thing, and tires. I would think by the time the car is coming down the line, a lot of these things were attached. I cannot see them lifting an engine up and putting it in the trunk of the car.

Mrs. Catton: No.

Mr. Mitchell: So where are the options shown on here?

Mrs. Catton: Look at the wheel area, for example. It says "wheel covers." You have a number underneath that.

Mr. Mitchell: Five.

Mrs. Catton: That wheel cover is a five.

Mr. Mitchell: I am sorry, you are missing my point. Take all the things that are on the sheet. I do not see many items on there he could pick up and put in the trunk.

Mrs. Catton: There is no dispute there are approximately 11 different options. On this sheet--

Mr. Mitchell: I am not arguing that. I am saying this is very confusing. You are telling us there are 11 and I do not think there is any dispute between the two. Certainly from the committee point of view, it would be nice to know. You are talking about wheel covers. What other sorts of things are there in the options that he would have to pick up and carry? They are saying he held options in his mouth.

Mrs. Catton: The antenna, the floor mat, for a station wagon the windshield wiper for the back, the special lock for the back door, the wheel covers, the--

Mr. Mitchell: Someone in here has mentioned roof rack.

Mrs. Catton: Roof rack for a station wagon.

Mr. Mitchell: That was an option he would have to pick up and put in the trunk?

Mrs. Catton: That is right. I will read from the transcript exactly what is there.

Mr. Mitchell: I am not trying to be difficult but I would like to get an idea of the options because then I would know exactly what sort of thing he was lifting and whether in fact anyone is capable really--it indicates in the testimony later on that the position was not capable of being done.

Mrs. Catton: The antenna, the deflectors for the bottom of the wheels, the mud flaps, the chrome around the licence plates, the windshield wiper on the tailgate of station wagon, the glove compartment lock, the aerial extension valve, roof rack--

Mr. Philip: These are put in the trunk of the car?

Mrs. Catton: They are put in the trunk of the car. The hubcaps.

Mr. Philip: Some of them are a good size then, if you are talking about roof racks.

Mrs. Catton: Yes, because it was the back of a station wagon.

Mr. Philip: They are bulky anyway and they would be in a box.

Mrs. Catton: No, they would not be in a box. They would just be in the bin, I would think.

Mr. Di Santo: How many times a minute?

Mrs. Catton: One car per minute was going down the line, so he would have to read the teletype and get those options on one car per minute. Does that answer your question, Mr. Mitchell?

Mr. Mitchell: Yes. It gives me a better handle on it.

2:30 p.m.

Mrs. Catton: So there is basically no dispute about the job he was required to do, from the employer's point of view or from the board's point of view. He had done this job since the beginning of the model year, which would have been August of the previous year.

Mr. Bell: We are dealing with seven or eight months?

Mrs. Catton: August to April, nine months.

Mr. Bell: How many hours a shift?

Mrs. Catton: He had been working for 10-hour shifts and an eight hour shift. He had been working 48 hours a week, probably since December of that year.

Mr. Philip: How long would this production line go on without him getting relief? Is there relief every half hour for a few minutes, or does it go on continuously?

Mrs. Catton: On a 10-hour shift he would get two breaks; lunch and another two breaks.

Mr. Philip: So he is running all the time, practically.

Mrs. Catton: That is right. The line does not close down. The line continues.

Mr. Philip: Yes, but someone steps in.

Mrs. Catton: To take his place, that is right. He would have two breaks in the morning, lunch and then two breaks in the afternoon. On an eight-hour shift, he would have only one break in the morning, lunch and one break in the afternoon.

Mr. Philip: It sounds like something out of Dante's description of Hell.

Mrs. Catton: Does anyone have any other questions about the job?

Mr. Bell: That is helpful. Now if you could continue with the job description.

Mrs. Catton: That is the job description. I do not have anything else to add about the job description. He was not required to carry anything over 10 pounds. The question was the number of decisions he had to make interpreting the teletype, all within 60 seconds.

I think we should turn to the medical evidence relied on by the Ombudsman.

Mr. Bell: Before you do, is there any evidence that he received any training in interpreting codes before he started this job?

Mrs. Catton: We do not know that but we do know that the line did not go to full capacity. The new-car line starts in August and they work up the number of cars per hour. It reached its maximum, 59 cars per hour, by October. So he had August and September to learn the codes. Each year there would be new codes for different cars. Certainly it would have been easier if they ran only one car on the line, but they did not, and this year 33

per cent of the cars they were running were stationwagons. If it is all sedans, it is a different ball game.

The other thing I want to make clear is that it is not just picking up 11 different things; it is picking up 11 different things from a choice of, say, six or seven of each thing. You could have six or seven different kinds of hubcaps. With antennas, you have one or two. With floor mats, you would have to know whether they would be custom floor mats, colour coded, all of those kinds of questions he would have to make the decision on, so he would have to carefully look at the teletype and decipher it.

Mr. Bell: Was this man evaluated on his performance in this job at any time before the incident?

Mrs. Catton: I do not have any evidence of that, no. All of the evidence, not disputed by the employer, was that he was incredibly conscientious and the other evidence that is available is that he was the only one who did the job by himself.

Mr. Bell: What does that mean?

Mrs. Catton: There were two shifts, an A shift and a B shift. Mr. N was on the A shift. He did the option job. He crossed the line, etc., by himself and he performed that function by himself.

On the B shift, there were two employees to do that job. One employee could not handle the job so they had two employees; one feeding from one side of the line and the other one feeding from the other side of the line.

Mr. Philip: And the two did this exclusively, or one is simply operated as part-time or relief?

Mrs. Catton: No. They did that exclusively, it is my understanding.

Mr. Philip: Is that the board's understanding?

Mr. Emmink: Yes, it is.

Mrs. Catton: I would like to refer to the medical evidence upon which the Ombudsman relied.

Mr. Bell: Tell us what happened to the man that day or in that period of time.

Mrs. Catton: He collapsed at work and was taken to hospital, and a left cerebral infarction was diagnosed. He has remained totally disabled since that time and suffers from some paralysis on his right side and some speech impediment--

Mr. Bell: We understand about the heart attack. I understand that two things happened: he suffered a cerebral infarction and a--

Mrs. Catton: Myocardial infarction.

Mr. Bell: Myocardial. What was the sequence?

Mrs. Catton: He suffered what has been diagnosed as basically a silent heart attack.

Mr. Bell: When?

Mrs. Catton: They do not know exactly, but shortly before the stroke at work. If I can read from the evidence of Dr. C before the appeal board, I think he gives you a good explanation of what happened to him:

"Mr. N experienced a myocardial infarction in the atrial septal area of the heart. The result was twofold. First of all, there was a formation of a ventricle aneurysm, and an enlargement of the heart muscle followed. And secondfold, there was the formation of clot material in the main chamber of the heart, the left ventricle.

"On April 19, 1978, a piece of this clot embolized"--which means it broke off--"from the main clot in the heart chamber and lodged in one of the main cerebral vessels on the left side, and that was what resulted in his stroke."

Mr. Van Horne: I am curious. This may not have any bearing on our decision here, but you indicated that he was doing this job by himself on one shift, and yet on the other shift two people were in fact responsible for the same work. Is that what you are saying?

Mrs. Catton: That is correct.

Mr. Van Horne: Did the union have any observations on this situation? Was there any attempt by the union to indicate that this person was being made to do things that were extraordinary, or was it just accepted that one person on one shift could do the work of two?

Mrs. Catton: No, it seems to me that on shift B they attempted to have one person do the work and because of union intervention they split the job up between two people because on the B shift they could not find anybody to do it by himself.

Mr. Bell: Is that a fact or are you guessing that?

Mrs. Catton: I can read to you from the transcript again:

"So the question is, if that job was good for one operator, then in that case it would be still left for the operator to do on the next model run. Second, on the shift that was opposite to Mr. N the job was done by three operators." I am sorry. "They split the work up because the operator on the opposite shift, which was the B shift, said he just couldn't handle the operation."

Mr. Van Horne: In those shifts the lines were running at the same rate? There was no change?

Mrs. Catton: There is no evidence of that, no.

Mr. Philip: So were the three doing one man's job, or were there really two jobs spread among three people?

Mrs. Catton: What I can say is that the job was done by three operators on the B shift.

Mr. Bell: Exclusively? That was their sole function on that shift?

Mrs. Catton:: Yes.

Mr. Van Horne: But only one on his shift?

Mrs. Catton: Only one on his shift. That is what the transcript states, and there was no dispute by the employer on that issue.

Mr. Hodgson: Just a minute before you leave that. Am I understanding correctly that the man in question operated the shift by himself?

Mrs. Catton: That is right.

Mr. Hodgson: On the next shift there were two who did the same work as he?

Mrs. Catton: Yes.

Mr. Hodgson: The same operation?

Mr. Chairman: Two or three?

Mrs. Catton: Three, according to the transcript.

Mr. Hodgson: You mean one man did the same work as three? Or were there three all together: the one fellow who operated alone and then--

2:40 p.m.

Mrs. Catton: No, one operated alone and three on the other shift.

Mr. Hodgson: Is there any reason behind there being three on the next shift and only one on the one before? It does not sound reasonable to me.

Mrs. Catton: They split the work up because the operator on the opposite shift, which was the B shift, said he could not handle the operation. That is the evidence.

Mr. Hodgson: It is a wonder the company did not change operators and put somebody on who was capable of doing the same work as number one.

Mrs. Catton: What the company did is that the job was changed and the functions were reallocated in different areas of the line.

Mr. Hodgson: How old a man are we talking about?

Mrs. Catton: He was 45 at the time.

Mr. Philip: Now that he is no longer doing the job on that shift, is it the same type of line?

Mrs. Catton: No.

Mr. Philip: What happened immediately after he was carted off? How many people replaced him on that shift?

Mrs. Catton: I do not know.

Mr. Philip: Do you have that information?

Mrs. Catton: I am sorry. There were two.

Mr. Philip: Two who replaced him on that shift when he became disabled?

Mrs. Catton: Yes.

Mr. Hennessy: If the amount of work was done--I do not know anything about it, not having been there; you have to take a guess at this. If three people are on one machine, would they each do a certain percentage of work? With one person on the machine, what percentage of work would he do in comparison to the other three?

Mr. Philip: The same thing. It is a line.

Mr. Hennessy: I am asking them. If I had wanted to ask you, I would have asked you.

Mr. Philip: Assuming you were listening to what they said.

Mr. Hennessy: I listen very carefully.

Mrs. Catton: I would assume that if he was not getting the options in the car at the time--

Mr. Hennessy: What Mr. Philip brings in is, if you sit on a machine, it does not necessarily mean you are going to do the same amount of work on a percentage basis. I am saying 10 people could sit on a machine and not do as much.

Mrs. Catton: Mr. Philip is correct. It was not on the machine. The cars were running down the line. It is not a production situation. The car is moving and you have to put the options in the car.

Mr. Hennessy: Do they run faster or slower?

Mrs. Catton: The cars move constantly at 59 cars an hour. They do not shut down the line. The line goes. Once they have the line running, it goes.

Mr. Emmink: May I try to assist the committee on this question of two or three operators?

The board's understanding is that after this particular model run, this job of options operator was redistributed to a number of other workers. I think the reference in the transcript to there being three operators refers to the situation after this particular model run had been completed, when the job was redistributed amongst other people in the plant.

I do not think it was the situation that Mr. N was doing it by himself on one shift and, when the next shift took over, three people were doing that job. I do not think that was the case. At least, the board was not of that understanding.

Mr. Chairman: On this particular model run, was there one on one shift and two on the other shift? That was mentioned earlier.

Mr. Emmink: I think that is the case.

Mr. Chairman: Is there anything additional at this stage, Mrs. Catton?

Mrs. Catton: About the job description?

Mr. Chairman: Or whatever.

Mrs. Catton: I would like to go over in detail the medical evidence the Ombudsman relied on.

The Ombudsman relied on three pieces of medical evidence. The first was the opinion of Dr. B, the family physician. To clarify any concerns, Dr. B had available to him transcripts of the appeals adjudicator hearing, which outlined in detail the job description, and he had his previous history plus the evidence that Dr. C was going to submit to the appeal board on the question of causation.

He said: "As a conscientious, hard worker, Mr. N would be exerting himself to his fullest capacity and therefore I feel it had to be a contributing factor. There was no history of hypertension and there was no medication. "It was my opinion then, as it remains at this time, following his extensive investigation, that this man's work was directly related to his stroke and collapse at work."

Then I refer the committee to the evidence of Dr. A. Dr. A is the neurologist who treated him in hospital. He was provided with a copy of the transcript. He was also provided with the evidence from the family physician, and he was provided with the research conducted by Dr. C. I would like to read his whole report into the record because I think it is crucial.

"I have reviewed the documents you have sent to me, from the union representative, which led to the decision that Mr. N did not suffer a heart attack and subsequent stroke as a result of the nature of his job in the motor plant and therefore is not eligible for compensation. I disagree with this statement.

"It is my opinion that the stress at work such as Mr. N underwent can lead to the series of events. Testimony at the hearing would clearly indicate that the job was both physically and mentally stressful. The medical evidence comes from articles in highly qualified journals." That is the evidence of Dr. C.

"Finally, the implication that Mr. N suffered from hypercholesterol and that his coronary arteriosclerosis was on this basis rather than stress at work, on searching our own records I could not find evidence that Mr. N did suffer from hypercholesterol."

Mr. Philip: Can I ask a question here? Normally when doing a general medical examination, at least his own MD would have done a cholesterol test for someone of this age. Would they have the cholesterol levels and such things that would indicate the contrary?

Mrs. Catton: Yes. There was evidence in June 1977 that his cholesterol was 331 milligrams, with the normal range being 150 to 260 milligrams. He was placed on a reduced cholesterol diet at that time.

With regard to his high blood pressure, his blood pressure was taken in May, October, November and December of 1975 and January and June of 1977 and at all times it was normal.

Mr. Philip: What was the time lapse between being put on the diet for high cholesterol and the time of the incident?

Mrs. Catton: That was in June 1977, and his stroke was in April 1978.

Mr. Philip: Normally a change of diet would bring down the cholesterol in less time than that, would it not?

Mrs. Catton: I do not know.

Mr. Philip: Dr. McCracken may know.

Mr. Hodgson: I have one question while you are on that. Was it necessary when he took the particular job that he had to have a medical examination, or is there any record that he had a medical examination by his family doctor or anybody prior to taking this employment?

Mrs. Catton: Yes, there is. You have some of the evidence I just referred to. There is no indication from the family doctor that his blood pressure was elevated prior to this.

Mr. Philip: Prior to taking the job?

Mrs. Catton: Immediately prior to this period.

Mr. Philip: Was any blood pressure or cholesterol test taken while he was on this job?

Mrs. Catton: I do not have any evidence of that.

Mr. Philip: Would the company doctor's records have that?

Mrs. Catton: I do not think there is any evidence of that. There was none presented.

I think it is important that we do not try to play doctor too, but that we rely on what the doctors who have assessed all these situations have to say.

2:50 p.m.

The only other critical piece of information that came to my attention about his pre-accident condition was that he suffered chest pains prior to the incident at work. In fact, he had electrocardiograms done at that time, while he was experiencing the chest pains in October 1975, I think. The electrocardiograms were normal at that time.

We cannot dispute that there was some heart disease prior to the heart attack. There was heart disease. The question is whether he had high blood pressure, and the answer appears to be no. On top of that, the evidence available to us was that heart disease in itself would not necessarily mean he would have suffered a heart attack.

I would like to review Dr. C's evidence, going through the reasons he felt it was a stressful situation and his analysis of it.

Mr. Van Horne: I just want to go back to the comments made about job description. It strikes me that we got off on a bit of a tangent into medical things and I do not think it came out that if something were amiss in the course of the duties of this man, if he were not able to get all the options, the line did not stop. Perhaps something would be missing and that would be checked and caught later on. I would assume that would reflect in any reporting done on his efficiency on the job.

Everything I have been able to read says he was conscientious, good and so on, but there was still the pressure that, if I can be so crude, if he screwed up, it would reflect on reporting on him and somebody later on would have to make up for whatever deficiency.

I do not know whether that has been talked about in the job description, but it strikes me that would add to the pressure on an employee--knowing full well that there is some reflection on him, that there may be some pressure from superiors, a supervisor or whomever, back on him. I doubt that there is a shift bonus on this.

Mr. Philip: There is some indication about that on page 3, if you would turn to the chronology.

Mr. Van Horne: I want to go back to what was said. Was that a consideration in your thinking as an additional pressure on the man?

Mrs. Catton: No, it was not. We were looking at the amount of work he had to do within a limited period of time. We were also relying on Dr. C's analysis of the work. I think that is very important. He did a literature search on stress and its relationship to work activities and identified several factors to determine, in his mind anyway, that it was stressful. That evidence is very persuasive for the Ombudsman.

Mr. Philip: There is an indication on page 3 that pressure was applied to the supervisor by the company to get one man to do the job. One might reasonably hypothesize from there that there would be pressure on him through the supervisor, who was being pressured to do the job himself. I think Mr. Van Horne's point is well taken. You do have some evidence in there that would lead us to conclude that.

Mrs. Catton: I think that is valid. The other thing you should bear in mind is that his first language is not English. Although it is not crucial in reading a teletype, it certainly would be a benefit to him. As co-worker H stated to the appeal adjudicator:

"My first language is English and as a utility operator in the previous five years I was able to perform all different types of operations. Therefore, I was more versatile due to my experience which allowed me to do work at a steadier pace. However, I was not able to complete the operation and this prompted the supervisor to recognize the problem with the work load."

The evidence of Dr. C was read in total at the appeal board hearing. Dr. C is a general practitioner who reviewed the case on the referral of the union representative prior to going to the appeal board. The employer had appealed this case. I think it is important to note too that he was given significant relief under the second accident enhancement fund from the Workers' Compensation Board. In other words, 75 per cent of the costs were transferred. He chose to appeal the allowance of his--

Mr. Bell: Is he receiving something now?

Mrs. Catton: The complainant? He did, and then the benefits stopped after the appeal board hearing.

Mr. Philip: Is he living strictly on his company pension?

Mrs. Catton: He was on sickness and accident benefits from the employer but those have now run out. He has no steady source of income now.

Mr. Philip: He does not even have a pension from his company?

Mrs. Catton: I do not know whether he has a pension. He might not have a pension because he might not have had enough years. He is no longer eligible for their sickness and accident benefits.

I would like to read into the record the qualifications of Dr. C as he outlined them to the appeals board.

"I am a general practitioner in Toronto. In terms of my qualifications to look at this particular case, I simply state that I have some interest in stress-related disease and have been able to do some primary research while in medical school on stress and neurochemical consequence of stress, and also since going into practice I have made a special point of dealing with stress-related diseases."

He graduated from the University of Toronto in 1980. Prior to providing an opinion on this case, he undertook a computer search of the literature at the U of T medical library as well as utilizing the computer at the Ministry of Labour to do a search of the literature. He prepared an opinion and supported that opinion with 16 pieces of medical research to draw his conclusions. Basically, it is his analysis of why the job was stressful.

He determined that the job was stressful for four basic reasons. First, it was repetitive. Second, it was machine-paced; in other words, the amount of work that was required to be done was determined by a machine. Third, there was a high level of physical activity, which is normally not a cause for coronary artery disease but is a protectorate; however, given the repetitive, machine-paced nature of the work, that heightened the stress level of the job, according to a study. Fourth, the complainant was required to work rotating shifts.

For those four reasons, he felt the job was stressful and contributed to the stroke that disabled the complainant.

He also reviewed the other possible reasons for arteriosclerotic disease and noted that the complainant smoked. That would put him at risk but in itself was not sufficient to assume it was the reason for the disability.

The Ombudsman found this very persuasive because it was a complete and thorough report. He had available to him the evidence at the appeals adjudicator hearing on the nature of the job. He appeared before the appeal board and gave his evidence. He allowed himself to be cross-examined or questioned. He did a complete search of the scientific evidence available and determined that there was a relationship. For those reasons, the Ombudsman was persuaded by that piece of evidence.

3 p.m.

Mr. Chairman: This has great significance in terms of your decision.

Mrs. Catton: In our view, this was a good--not because it was supportive; it is not necessarily good, but it was a well-reasoned medical opinion where research did not seem to have validity. There was no evidence to question any of the comments made by the doctor. Nobody disputed the quality of his analysis or of the source of his literature research. It seemed to be an excellent analysis of the situation and well documented.

Mr. Chairman: The fact that he is just a recent graduate did not enter into it?

Mrs. Catton: What seemed more important was that this is a very difficult field. There are no standards to measure stress. It is not like hearing loss, where you know that there is a 90-decibel hearing loss or that noise over 90 decibels can damage your ears. You do not have those kinds of specific factors.

The literature is not conclusive on the subject, but to have somebody who has reviewed the literature and come up with an opinion is persuasive, and that was not done by any of the physicians in the file.

Mr. Bell: Did he examine him?

Mrs. Catton: No, he did not.

Mr. Bell: Could you address the opinion of Dr. D, which is the opinion it seems the board relies upon most heavily?

Mrs. Catton: Dr. D had available to him, from my review of the file, the previous medical opinions provided by the board, on the board's files, from their consultants and the history of the complainant. I could not find that he had copies of the transcript of the hearing describing the job.

Mr. Philip: Let us ask the board that. Did he have transcripts?

Mr. Emmink: He had the man's complete file, and he says that in the first sentence of his report.

Mr. Philip: Including a job description?

Mr. Emmink: Including the job description obtained through investigation. That is correct.

Mr. Di Santo: And the transcript?

Mr. Bell: That includes the transcript, does it, Mr. Emmink?

Mr. Emmink: No, not the transcript; the job description obtained by the board's field representatives.

Mr. Philip: Can we have a copy of that job description? It would be interesting to know whether the description is identical to the description that was given to us earlier.

Mr. Emmink: If you will give me a moment, I can try to locate it.

Mr. Philip: It may be an abbreviated description, which would indicate that the doctor did not have all the information.

Mrs. Catton: I would also like to point out that Dr. D was under the mistaken impression that Mr. N had not had a

previous electrocardiogram. He based his opinion, it appears, on his assumption that:

"His work is well outlined and, though it is probable he was associated with a moderate amount of tension and stress and he did a good deal of walking, there was nothing unduly strenuous, and it was apparently the same type of work that he had been doing for some time.

"I do not see anything about his work that one can attribute to the cause of his cerebral embolism; and certainly his myocardial infarction occurred days before his embolism, and this was a natural event in the course of his extensive coronary atherosclerotic disease."

Mr. Bell: All right. What do you say about that last point? His point is that you really have to look at what caused the heart attack because the heart attack caused the embolus. He had the heart attack before the day in question, and he was a walking time bomb; it was just a matter of time before that embolus broke off. You cannot blame that on the job. What do you say the evidence that you rely upon says about that?

Ms. Bohnen: The evidence of Dr. C--and I do not know that Mrs. Catton previously reviewed it--addresses that point. In the transcript he states:

"The scientific literature that I reviewed left little doubt that there exists a general relationship between work-related stress and the development of cardiovascular disease, especially myocardial infarction. Two excellent review articles...provide an excellent framework for understanding the general nature of the link between the stress response and the genesis of heart disease. Other articles highlight the importance of the work environment as a source of stress." Then he goes on to discuss further literature relating stress to heart disease and heart attacks.

Mr. Bell: Did Dr. C have the transcripts of the hearing?

Mrs. Catton: Which doctor are you talking about?

Ms. Bohnen: Dr. C had the transcripts of the first two.

Mr. Bell: The one you just read from, transcripts of the hearing. Did he have the patient's medical file?

Mrs. Catton: From his family doctor, yes.

Mr. Di Santo: Since the nature of the work is one of the issues, since the decision of the board takes almost verbatim a sentence of the report from Dr. D, I would like to ask if at least we can clarify this point. The contention is that since this person has been repeating the same type of work without incident for a protracted period of time, therefore that work is not strenuous.

Mr. Philip: Stressful.

Mr. Di Santo: It said "unduly strenuous." Do you not think that is a sophism?

Mr. Emmink: I beg your pardon, Mr. Di Santo?

Mr. Di Santo: That it is a false rationale?

Mr. Emmink: No.

Mr. Di Santo: Let me give you an example. If you are a miner for 10 years without an incident, can you say that work is not strenuous only because you did not have an incident?

Mr. Emmink: I would say for that man it may not be strenuous. For me, it would certainly be strenuous because I am not used to it. If I had been doing it for 10 years, I would be accustomed to it and would not find it strenuous.

Mrs. Catton: Just on that point, I think it is important to note that Dr. C in his report takes exception to that and notes that one of the most important aspects of stress is the duration of the stress. The literature that he relied on indicates that stress over a prolonged period of time has more serious chemical and physical consequences for the body than does intermittent stress.

Mr. Philip: It is also related, is it not, as to whether or not there is an end in sight? Was there any end in sight to this job for this man? When would the line be finished on this car, where he would be transferred into another type of position?

Mrs. Catton: In July, when they closed down the line to put in the new model lines.

Mr. Philip: So he could look into the future and see himself doing that for a long time.

Mrs. Catton: That is right, unless he opted for another job.

Mr. Bell: Have you said anything about Dr. E yet?

Mrs. Catton: No.

Mr. Bell: The reason I ask you is because it seems, chronologically in these medical reports, Dr. E came after Dr. D. There is no mistaking that Dr. D is the biggest obstacle you have. Dr. E, from the extract of his report on page 4 of the synopsis, appears to take issue with it. Can you comment on that in more detail? For example, why was Dr. E asked to comment? What, if anything happened as a result?

Mrs. Catton: Dr. E, as I understand it, was asked to comment as a result of the appeal board hearing. Is that correct?

Mr. Emmink: No, as a result of the appeals adjudicator hearing.

Mrs. Catton: The appeals adjudicator, the actual person who heard the appeal, was persuaded by the evidence and asked for the matter to be referred to the board's consultant. That is when this opinion was rendered.

Mr. Bell: Dr. E's?

Mrs. Catton: That is right.

Mr. Bell: He is described by you as a consultant in industrial diseases. Does he have any more specific medical specialty than that?

3:10 p.m.

Mrs. Catton: I would suggest you ask the board. I do not know specifically.

Mr. Emmink: I am sorry, Mr. Bell, could you repeat that?

Mr. Bell: Does Dr. E have any more specific medical specialty than consultant in industrial diseases?

Mr. Emmink: Can I consult with Dr. McCracken? I think he would know.

Mr. Bell: Sure.

Mr. Emmink: I am informed that Dr. E has no specific qualifications in industrial medicine, but gained her experience in this field through 25 years of dealing with this type of claim at the board.

Mr. Bell: Compensation claims?

Mr. Emmink: Yes.

Mr. Bell: So she would be one of the people Dr. McCracken described yesterday as highly qualified to do this type of thing?

Mr. Emmink: Yes.

Mr. Bell: That is opposed to Dr. D, who is in private practice?

Mr. Emmink: Dr. D is in private practice.

Mr. Bell: This is the reverse of the situation we had yesterday.

Mr. Emmink: Yes.

Mr. Bell: Yesterday you preferred the evidence of your in-house people. In this case you prefer the evidence of--I will not use the opposite of "in-house"--people in private practice. Is that correct?

Mr. Emmink: No. In this case what actually happened was that the opinion from Dr. D, the outside cardiologist, was not supportive. The opinion from Dr. E, the board's own consultant, ran counter to that and was more supportive, and it was on that basis that the appeals adjudicator allowed the appeal at that stage.

Mr. Bell: So we can trace that up, when we arrive at the appeal board level, the appeal board level then decided it preferred the medical evidence of D over E?

Mr. Emmink: No. What happened at that stage is that as a result of the appeal board hearing, Dr. E disagreed with Dr. D because Dr. E felt that the appeals adjudicator had accepted that the work was unduly strenuous. When the matter came before the appeal board, following representations made by the employer, the appeal board was not of that opinion and asked Dr. E to consider the matter in the context of the work not being strenuous, but rather work that this person was accustomed to doing. Given that parameter, Dr. E changed her mind and agreed with Dr. D.

Mr. Di Santo: Where is that?

Mr. Emmink: This really flowed from a discussion between the appeal board panel and Dr. E subsequent to the hearing. There was no recording of that, so I asked Dr. E if she would mind setting out in black and white the rationale for changing her mind. She did that in January of this year and a copy of that was forwarded to the Ombudsman's office at some point after that.

Mr. Bell: That is referred to at page 4 of the board's response to the Ombudsman's 22(3) report, which is at page 47 of the material. I believe the entire page is Dr. E's subsequent report.

Mr. Emmink: That is right. That was Dr. E's report in January 1984, which really explains why she changed her mind.

Mr. Bell: Show us in her language where she does change her mind.

Mr. Emmink: Perhaps I should go back a paragraph.

Mr. Philip: Where are you reading from?

Mr. Emmink: I am reading from Dr. E's report of January 6, 1984, and you may not have all of this. I believe you have a portion of it.

Mr. Bell: Will you tell us when you get to the part that is included on page 4 of the response, which is page 47 of our material? It starts, "From the evidence of Mr. F."

Mr. Emmink: Okay. The reference to Dr. E that you have on page 4 of the case summary is her initial memorandum placed on the file at the time of the appeals adjudicator hearing. What I am referring to is the reference near the bottom of page 6 to Dr. E's memorandum dated January 6, 1984.

Mr. Bell: Page 6 of what?

Mr. Emmink: Page 6 of the summary. I think the committee might be assisted by just referring to this. The reason for changing her mind was, as she says here:

"From a file adjudication point of view, the question is, was his work of excessive physical exertion over long shifts of up to 10 hours causing him to exert himself to his fullest capability? From the evidence of Mr. F at the appeals adjudicator hearing, it seemed the job was very demanding. This is the reason memo 15"--which is contained on page 4--"was placed on file to the adjudicator"--

Mr. Bell: Just stop there. Is that the memo the Ombudsman relies upon?

Mr. Emmink: Yes. If he were willing to accept a representative history of the job activity, there could be merit to the claim. However, when the appeal board held its hearing, this excessive activity was refuted, and this was the reason for the change in decision.

Mr. Bell: Where in those four paragraphs does she change her opinion?

Mr. Emmink: It was the discussion that was held with the appeal board following the appeal board hearing.

Mr. Bell: Yes, but where does she record a change of her opinion?

Mr. Emmink: That is what I am saying. That discussion was not recorded, but there was a change of opinion and a verbal discussion, and I asked her to explain to me why that opinion changed.

Mr. Di Santo: It seems as if that decision is based on hearsay.

Mr. Emmink: It is not unusual for an appeal board, when it requires clarification on medical matters, to ask to consult with a physician.

Mr. Di Santo: I have seen many cases in which everything is recorded, even conversations that have no relevance at all to the case. You have a case where there is a change of opinion of one of the doctors that will bring about a change of decision, and that is not recorded.

Mr. Emmink: Mr. Di Santo, I, too, regret that the conversation was not recorded at the time. It would have assisted tremendously if it had been.

Mr. Di Santo: So as far as this committee is concerned, that conversation does not exist.

Mr. MacQuarrie: As Mr. Bell has pointed out, it seems

that the pertinent points of Dr. E's evidence are set out on page 47.

Mr. Breithaupt: --(inaudible) then, presumably, it got changed.

Mr. MacQuarrie: This is when she apparently changes her opinion, as expressed in memo 15. If you read that through, you certainly get the sense that she has changed her opinion.

Mr. Bell: Except for that last phrase in brackets.

Mr. Emmink: And I am not sure what that means.

Mr. Bell: Was this doctor's opinion--the original opinion, memo 15--received in evidence by either of the sides and relied upon by either of the sides at the appeal board hearing?

Mr. Emmink: No. I believe it was received by the adjudicator after the hearing; in other words, the hearing took place, the adjudicator sought medical advice from this physician, and, on receiving it, made a decision.

Mrs. Catton: Mr. Bell, just to clarify that point, that opinion, that memo, was written on January 6, 1982.

Mr. Bell: No. That is not about the adjudicator's hearing. Page 3 of the response speaks about "E subsequently acquainted with additional evidence provided at the appeal board hearing," and you have told us that she was acquainted by some conversation after the hearing between her and some of the appeal board commissioners and/or yourself.

Mr. Emmink: I was not involved.

Mr. Bell: All right, so it was the appeal board commissioners. My question is, at the appeal board hearing, was her opinion, memorandum 15, specifically relied upon by the representative of the worker?

Mr. Emmink: To my knowledge, it was not.

3:20 p.m.

Mr. Di Santo: We do not have the transcript of the appeal board hearing, but on page 7 it says that his excessive activity was refuted. By whom?

Mr. Emmink: I beg your pardon?

Mr. Di Santo: His excessive activity was refuted, and this was the reason for the change of opinion.

Mr. Emmink: It was refuted by the employer.

Mr. Di Santo: It does not appear in the decision of the board. What did the employer say?

Mr. Emmink: The employer made submissions in respect of the work and appeared at the hearing. I can read from the letter sent to the board and from the transcript if it will assist the committee. Perhaps the most concise way of doing it would be to read from the letter received by the board on February 28, 1983. This was a letter sent to the board in response to a statement submitted by the Ombudsman from Mr. H. "The company records show that Mr. H was the utility"--no, that is not really relevant.

Mr. Di Santo: Is what you are referring to on page 2 of the summary?

Mr. Emmink: "I can say this. Mr. H's statement that this job was a physical impossibility is ridiculous. In fact, it was generally considered as one of the most desirable jobs in the department. The operation was eliminated for manpower reduction reasons only, not because there was a problem with excessive work load, as Mr. H suggests. The elements of this job were easily rebalanced among other employees."

That sort of encapsulates the employer's views on that job.

Mr. Philip: If this was a highly desired job, how come the employer had to get three people to do it on the other shift?

Mr. Emmink: I have no idea.

Mr. Philip: You would think there would be people lined up to do this job, all of them saying: "I will do it alone. You do not need to have three people there. Gosh, I want that job."

Mr. Emmink: I am just repeating what the employer said.

Mrs. Catton: Just for the record, Mr. Emmink is quoting from a response from the employer to the board in response to the Ombudsman's 19(3) letter. We never got a response from the employer and the employer was at the appeal board hearing. My review disputes the job description as explained by the employer's representative at the time of the hearing. The information Mr. Emmink is referring to came subsequent to the decision and was not available to the Ombudsman for consideration either.

Mr. Emmink: It was. The employer was given an opportunity to comment on the statement of Mr. H, who received the employer's comments, and those comments were then referred to your office.

Mrs. Catton: They were referred in the response to the--

Mr. Emmink: No, but a copy of the letter was sent.

Mr. Di Santo: We have the testimony of the co-worker and the testimony of the foreman, both of whom indicated the job was stressful. The only thing the representative of the employer had to say was he did not refute any of the allegations made by the co-worker. He said the co-worker was not even a co-worker so he could not testify in that way, but he did not say whether it was true this guy was running with the parts in his mouth and under

his arms. He did not say, "That is not true."

Mr. Emmink: I do not think that is in dispute. I think the nature of the job is agreed on. The employer was objecting to the ability of that witness to determine whether that evoked a stress response in Mr. N.

Mr. MacQuarrie: I understand circumstances with respect to working conditions, job descriptions and the rest have changed in the plant since that time. Have you investigated whether fewer men are doing this and other related jobs at the present time than there were at the time the incident occurred?

Mrs. Catton: My understanding is that they have changed the setup of the line so that this job per se does not exist. So you cannot say today that there are two men or one man doing the same job.

Mr. MacQuarrie: No. I was wondering whether there were fewer employees engaged in a certain process along the line than there were at the time of the incident. It seems, from what Mr. Emmink read, that there were fewer employees engaged in doing this job than others.

Mr. Emmink: I can perhaps clarify that. There was a letter from the acting industrial engineering manager at the employer to explain the evolution of this job. He says in this letter:

"The operation called deck-lid letters, to which Mr. N was assigned for a period of time in the fall of 1977 and the spring of 1978, was set up as a result of the manning requirements for the 1978 Fairmont Zephyr. The job consisted of elements such as stocking the trunk with wheel covers, aerials and in installing deck-lid letters. The elements of the operation promoted a strong potential for rebalance because they were easily relocatable and on September 26, 1978, plans were made to reallocate those elements to other operators and achieve a manpower reduction. The job was successfully balanced out by October 17, 1978."

What they did was they took the elements of this job and simply spread them out among other people on the line.

Mr. MacQuarrie: I just wondered whether there was a manpower reduction.

Mr. Philip: I have some questions for Mr. Emmink concerning Dr. E's statement. Do I take it that you have now found the job description?

Mr. Emmink: Yes.

Mr. Philip: Did Dr. E get as detailed a job description as was supplied to the committee by Mrs. Catton?

Mr. Emmink: If you wish, I will read the job description that was obtained, to which Dr. E would have had access.

"The man's job was basically the option job for completed cars. What this would mean is that the employee would look at the teletype print sheet, which would be taped to the side of a car or would be inside the car on the dashboard, to see what options a particular dealer had requested on this particular car. Depending on what the print sheet would state, from the boxes at the side of the moving assembly line he would pick out various options and put them in the back of the car. These would range anywhere from three or four different styles of wheel coverings, to antenna, carpets, rear wiper blades for the stationwagon, licence plates, roof racks for stationwagons and on some models he would install, with a small airgun, a window handle on an air vent. This job also required him to reach inside the car and install two screws in the rear of the stationwagon to hold down the carpeting platforms."

If anything, I think that description has elements in addition to those related earlier.

Mr. Philip: Is that all she received?

Mr. Emmink: Yes. That is all she received related to the job description.

Mr. Philip: I think there are noticeable absences there. One is that it does not say as many as 11 items, and the other is it does not give the speed at which he had to operate and the fact that he had no control over that speed.

Mr. Emmink: If you give me a moment, I will see if that is in here somewhere as well.

Mr. Breithaupt: It sounds like Modern Times.

Mr. Philip: While you are looking for that--or maybe you can get it for us later--I would like to ask you a couple of questions on Dr. E's statement. It says, "The board would not consider mental stress in this situation since there was no sudden event to precipitate acute anxiety." Does it have to be a sudden event to precipitate acute anxiety?

3:30 p.m.

Mr. Emmink: The board's policy on the allowance of claims for cardiovascular disorders--and I suppose this could be characterized as a cardiovascular claim--relates to situations where there is a sudden, acute, stressful situation.

The types of situations we see frequently are cases involving firefighters. A significant amount of their time is spent in more or less sedentary activity, the alarm goes and they are jumping on a truck. They are sometimes carrying up to 100 pounds of equipment and they are going into smoke-filled rooms. That evokes a very sudden stress response that can bring about a cardiovascular accident. This is the type of situation the board envisages as being a stress-related injury.

Mr. Philip: In your opinion then, to have a stress-related clause, it has to be a sudden activity. You do not

accept the fact that the literature shows that a constant series of stresses built up over a long period of time, without any end in sight, can be equally stressful and can bring on cardiac problems or be related to strokes?

Mr. Emmink: I suppose even the Ombudsman agrees that the evidence in that regard is not conclusive. Certainly there is evidence that suggests that. There is other evidence that does not suggest that.

Again I do not want to place you in the position of hearing new evidence, but Dr. McCracken is present today, and if the committee feels it would be assisted by hearing from Dr. McCracken in terms of the question raised by Mr. Philip, he would be happy to assist.

Mr. Bell: Mr. Chairman, I think you would be interested in hearing from Dr. McCracken in so far as the board's guidelines are concerned. The guidelines to which you have been alluding, Mr. Philip, are set out in the Ombudsman's material somewhere. The committee might be interested to know what the board only acknowledges or considers to be an unusual or a single stressful situation which will permit compensation.

Doctor, can you help us with a definition for a moment? Members of the committee, in the Ombudsman's report, page 4, which is at page 35 of your material, the second paragraph refers to the board's guidelines. Dr. McCracken, I want to make sure the guidelines have been fully set out. What is stated there is:

"The board's guidelines indicate that entitlement for a cardiac condition is considered under the following circumstance: 'Unusual physical exertion for the individual and/or acute emotional stress with no significant delay in the onset of symptoms.'"

Does that fully set forth the guidelines, or is there something more we should hear?

Dr. McCracken: No, that is laid down in the guidelines.

Mr. Bell: Is it accepted that those are the guidelines that apply to this fact situation?

Dr. McCracken: Apply to which, Mr. Bell?

Mr. Bell: To this fact situation. I am not trying to trap you, but these are the guidelines appropriate to consider when assessing whether compensation is appropriate for this case?

Dr. McCracken: These guidelines are based upon the preponderance of scientific opinion, bearing in mind--

Mr. Bell: I appreciate that, but are these the most relevant guidelines for this case?

Dr. McCracken: Yes, they are.

Mr. Bell: All right. There are no other guidelines we should be looking at additionally or instead?

Dr. McCracken: No.

Mr. Bell: Are there parameters to the phrase "unusual physical exertion"? What is meant by "unusual physical exertion"?

Dr. McCracken: Unusual physical exertion is where it is determined upon investigation by the investigation staff in a given claim that something has occurred in the course of employment which has required that worker to do something outside of his usual day in, day out type of employment.

For example, in the case of the night watchman whose ordinary work is to walk from building A to building B and punch the alarm clock and make his rounds, an unusual physical exertion would develop in a situation like that if he had to do that type of work under a physically stressful situation; for example, in the middle of winter, with a very bad snowstorm, where he had to plough his way through snowdrifts two to three feet deep.

Under those circumstances, if that individual were to have a myocardial infarction, the guidelines would act to assist in the adjudication to identify that something abnormal by way of physical stress had occurred, and in all probability such a case would be allowed.

Mr. Bell: What if the man's job was unloading 50- to 75-pound bushels of vegetables daily at the Ontario Food Terminal, and that is all he did, and he had a heart attack lifting a particular bushel on a particular day? Would the board consider that he does not come within the guidelines?

Dr. McCracken: That is correct because that is his usual type of employment. One must bear in mind that somewhere less than 10 per cent of all myocardial infarctions occur on the job. The vast majority occur, as a matter of fact, when the person is totally at rest.

Mr. Bell: So if I did pay worker's compensation and if I dropped dead of a heart attack in the courtroom, the fact that that is my job means "Tough luck."

Dr. McCracken: That is right, unless there is an unusual situation. For example, let us say you were threatened suddenly by someone who produced a gun and you had a heart attack. That could be interpreted as abnormal, acute emotional stress, which would be a precipitating factor imposed upon you, in the hypothetical example, who obviously had pre-existing coronary artery disease.

Mr. Philip: Suppose we take that example and say that suddenly in this city--and one would hope this would not happen, but I will go back to your night watchman case because it may be more descriptive--there was a rash of lawyers being shot in the courtrooms in the way that some of these things--

Interjections.

Mr. Philip: It is not wishful thinking; it is simply a description.

If John Bell were to succumb in the courtroom, would he be any more eligible for compensation under those circumstances? It is not the physical threat by somebody with a gun but the series of worries that a whole bunch of lawyers are talking about the fact that five or six of them have been shot, there is extra security around, people are wandering around in uniforms and a whole series of things then build up. Would he be eligible then?

Dr. McCracken: My response to that hypothetical situation would be no, he would not, because it is appreciated that this is part of what occurs in the course of his particular profession and employment.

It is just the same with doctors, for instance. Doctors are threatened by dissatisfied patients, and indeed there have been threats of physical violence. Should a doctor have a heart attack thinking about the fact that he has a patient who might suddenly appear in the office, that does not constitute the type of abnormal stress that one can relate to increase in blood pressure, increase in heart rate, starvation of the heart muscle for oxygen and the precipitation of a myocardial infarction, because that is the basis of it.

Mr. Philip: Let us take your example of the night watchman. The night watchman has been walking his rounds--it is not physically strenuous--for several years. Suddenly a motorcycle gang moves into the neighbourhood and there are a lot of break-ins and a number of night watchmen are mugged or physically hurt. He asks for additional help, because normally in other buildings there are two night watchmen now because of the increased crime in that neighbourhood, but he does not get it. He has to walk those rounds alone, and he has a heart attack. Would he be eligible?

Dr. McCracken: Under that hypothetical circumstance, I would say no, he would not.

Mr. Philip: So what you are telling the committee is that unless there is a dramatic incident, the fact that there may be psychological dangers, the fact that there may be increased stress over a series of things that are unusual for that one person to experience--as in the case of this man, who is doing the work of two or three people--the psychological stress of that--

Mr. Bell: That is the next part of the guidelines. Stay to the physical.

Mr. Philip: Okay. The physical exertion of having to do the additional work that two or three other people do would not, in your opinion, make him compensable.

3:40 p.m.

Dr. McCracken: It would only do so if it were possible to document that the physical exertion was of real significance, i.e., if it was observed that he was constantly perspiring, that

he was constantly short of breath from having to rush back and forth, that it was obvious he was under significant, abnormal physical types of activity, that he was breathing hard consistently and having to do this type of work--

Mr. Philip: Unlike the perhaps more extroverted person. The fellow who is able to control that and then goes home and has 10 mins to fall asleep in an exhausted state as a result of that day would not be compensable, whereas the fellow who shows more extroverted manifestations of the physical activity would be compensable.

Dr. McCracken: No. They are not factors that are controllable by whether you are an extrovert or an introvert. Constant perspiration is not controllable on an emotional basis. There are some people who are so hypermobile from an emotional standpoint that they can break out in a transient perspiration, but it is very transient; it is not controllable.

In other words, it would be totally impossible from a medical standpoint for someone to go through a full shift of work hyperventilating and to go through a whole shift of work making himself perspire. It is not physiologically possible.

Mr. Philip: Would you not agree that with people under that kind of pressure, of two people exposed to identical pressure, one person might show external symptoms and the other might show symptoms such as ulcers or other things that are not visible or observable, except perhaps to the knowledge of the individual himself or maybe one or two people he may have confidence in and may talk to about it?

Dr. McCracken: There was a study carried out by a task force set up by American cardiologists and cardiovascular specialists. What you are talking about is type A and type B, type A being the hard-driving type of individual and type B being a person who tends to take a more moderate approach to life. They studied the two different types to see if they could elicit any difference.

Mr. Chairman: I am going to interrupt at this time because I think we are essentially getting into the same kind of area we got into the other day, talking about studies that were--

Dr. McCracken: This is the only way I can answer it.

Mr. Philip: I know the study you are referring to was also contradicted by the medical profession after its release.

Dr. McCracken: It is generally accepted that there is no difference.

Mr. Philip: It was also contradicted by several other heart specialists after it was released.

Mr. Bell: Dr. McCracken, I have one more question on the physical before we get to the second half of the guidelines. Let us accept for the moment that on the second shift two people

performed the job that this one individual did. We may fool around with the numbers, but I think we are all ad idem that at least two people did the job of one. Assume that one of those two men was shifted from his shift on to the shift that this man performed, and was then performing that job alone. Are you with me so far?

Dr. McCracken: Yes.

Mr. Bell: He suffers a heart attack on the job, because the evidence is that whereas he had been performing half the functions, he was performing all of them. Would he be entitled under these guidelines to compensation for that heart attack?

Dr. McCracken: He would not be if he had been on the job and had become acclimatized to it. For instance, in this particular case I understand this person had been on the job for approximately eight months. If a person was brought on to a particularly strenuous job from a physical and emotional standpoint, and if he were dumped into the job, if you will, precipitated into it, and he was not used to it and it was demonstrated that there was evidence of abnormal emotional and physical stress being exerted, and if that individual were to have a heart attack at that time, then these guidelines might well apply.

Mr. Bell: Okay. Can we go to the second part of the guidelines? I heard you on the fiscal side, but there is another side; the emotional side, if you will, is another way in which entitlement would be considered. On the phrase, "acute emotional stress with no significant delay in the onset of symptoms"--taking the first, what does "acute emotional stress" mean as far as the board is concerned?

Dr. McCracken: An example of acute emotional stress--and some of them are examples of actual cases that the board has dealt with--is if a worker sees a fellow worker crushed to death. Flowing from that, he experiences acute emotional stress, a temporary severe nervous upset, so he is unable to work.

Another example is a firefighter who is fighting a fire and realizes that a woman and child are trapped in a building. Superimposed upon the excessive physical stress he is working under, he now has to cope with a fairly abnormal degree of emotional stress because he realizes that he is the person in a position to save those two people, and he may well not succeed. If he were to have a heart attack, that would indeed be interpreted as an abnormal or acute emotional stress situation.

Mr. Di Santo: May I ask a supplementary? On what scientific basis can the board conclude that a protracted situation of stress can produce the same effects as Dr. A tends to believe?


Dr. McCracken: Mr. Chairman, if I answer that question, I am afraid I will be violating the conditions you have set down, because I will be introducing new evidence of opinions expressed by various task forces, etc.

Mr. Di Santo: Let me rephrase the question, then. Why was the opinion expressed by Dr. A, chief of clinical neurological science, which says, "I disagree with the statement"--I do not know what to read to you. "It is my opinion that stress at work, such as Mr. N underwent in the opinion of the board, is not an acute stress but can lead to this series of events." On what basis can you deny that this theory is acceptable?

Dr. McCracken: Mr. Di Santo, all I can say is that this represents the individual opinion of that particular physician. The question is, does that represent the preponderance of medical opinion?

Mr. Di Santo: I do not know how to put it. This is not a statement, a diagnosis related to a specific case, but, in fact, it says that when you are in this type of situation, such as the one in which Mr. N was operating, you can have the type of results that he suffered.

Dr. McCracken: Mr. Di Santo, I have said that this obviously represents that particular physician's opinion, based upon something; I cannot tell you what that something is. It might be his personal experience in his practice. However, the board



must rely upon the preponderance of opinion in the medical profession, in the scientific community.

Mr. Di Santo: Let me finish this. In your opinion, is this an opinion of one specialist, based on his experience, or is it the result of a body of opinions that neither you nor we know about? Do you think this opinion could have any credibility? Do you really think it has to be rejected, and, if so, why?

Dr. McCracken: Possibly someone could help me here. In expressing that opinion, was this physician talking specifically about the stroke--

Mr. Di Santo: Yes.

Dr. McCracken: --or was he talking about the heart attack?

Mrs. Catton: About the heart attack.

3:50 p.m.

Dr. McCracken: Because if he was talking about the stroke, it would certainly be my opinion that stress is not a causal factor for the type of stroke this individual had. In other words, there are various types of causative mechanisms for strokes, one being the rupture of a blood vessel and haemorrhage, the other one being a thrombosis or clotting of the blood within the blood vessel in the brain, and a third one being the type of condition that this individual had, which was a piece of blood clot breaking off in the heart, passing up through the carotid arteries and lodging in a vessel in the brain. To my knowledge, this type of stroke cannot occur from stress.

Mr. Philip: May I ask a question of Dr. Hill?

The Acting Chairman (Mr. Van Horne): Excuse me, are you finished, Mr. Di Santo, with that line of questioning?

Mr. Philip: I was the questioner, he was the one asking the supplementaries.

The Acting Chairman (Mr. Van Horne): If they were supplementaries, if he is finished, that is fine.

Mr. Di Santo: So in fact you are saying he made an error?

Dr. McCracken: No, I am not saying that, Mr. Di Santo. All I am saying is that in his clinical opinion he apparently came to this conclusion. What I am saying is that, from a patho-physiological standpoint the one type of stroke that can be caused by stress, which is associated with a significant rise in blood pressure in the face of pre-existing disease in the blood vessels of the brain, is a rupture of one of those vessels resulting in bleeding into the brain substance and a stroke. That type can occur as a result of stress. But a clot lodging in the brain, to my knowledge, cannot be caused by stress.

Mr. Philip: So you are saying this fellow could die of a heart attack from the kind of job he had, but not of a stroke.

Dr. McCracken: Certainly stress can be a precipitating factor in a person who has pre-existing disease of a coronary artery. The reason is that under significant stress, be it physical or acute emotional stress, a number of things happen. One is that the heart rate starts to increase. The second thing is that the blood pressure starts to rise. The third thing is that as a result of this, the heart muscle is demanding more oxygen in order to function.

This is unlike the brain, because no matter how much we think there is absolutely no increased demand for oxygen on the brain. You can have your brain in neutral, or you can be working very hard at solving a very intricate problem and the oxygen demands are the same. So the increasing oxygen demand, rather than the plugging of the artery, is the cause of the myocardial infarction.

Mr. Philip: So what you are saying is that the kind of position this fellow had could bring on a heart attack, and that heart attack could bring on a stroke, so the stroke then can be traced back to the original condition which is the ongoing stressful position.

Dr. McCracken: No, I am afraid you might be putting words in my mouth. I said that under situations of acute stress--

Mr. Philip: I did not think you would agree with me. I think it is a logical conclusion of what you were saying.

The Acting Chairman: Could I interrupt for a moment, because it seems that this line of thinking is at least a crossroads. We seem to have another person who wants to add to it before we get on to another theme.

Ms. Bohnen: We do not want to be obnoxious or insulting, but what seems to be happening is that Dr. McCracken is being adopted by this committee as an independent medical consultant. None of the evidence that he is giving you today was presented to us or presented to the appeals board. The evidence we have been trying to leave before you was before the board. That considerable scientific literature adduced by Dr. C was available to the board and at the adjudicator level was relied upon. It virtually is impossible for us to speak to this new medical evidence Dr. McCracken is putting in. Frankly, we do not think this is a fair procedure to follow.

Mr. Philip: I did not find Dr. McCracken all that--

Mr. Bell: I can assure you, I do not think you have to be concerned over this committee's, or its counsel's, ability to separate the matters that were relevant and available to the Ombudsman and the board at the material times versus what the committee has heard today. Dr. McCracken was invited by me to explain the directive. I think he has been extremely helpful. I think we are able to separate other matters. We have had your

caution now about three or four times, which is not an unwelcome caution, but the point has been made.

Mr. Philip: I want to ask Dr. Hill something. I recognize that perhaps a good part of this report was prepared by your predecessor, but why would you not--maybe I missed it, maybe it is in the recommendations--since you came down in favour of this applicant, also come down with a recommendation that the board's guidelines indicating the entitlement for a cardiac condition be changed, since those guidelines appear to be part of its argument against accepting this particular applicant?

Mrs. Catton: Mr. Philip, I think I can answer you. In this particular case we had evidence strongly in support of the complainant. We did not conduct a search of the medical literature, nor did we retain any independent opinions to determine whether the position put forward by the complainant's representative was, in fact, a fair reflection of the literature.

We relied on the fact that the board did not bring any evidence to bear to dispute that evidence or other review of the medical literature, but we did not take it upon ourselves to conduct what we felt would be necessary to make that kind of recommendation.

Mr. Philip: Would it be reasonable then, since Dr. Hill, much to my delight and enthusiasm, is placing emphasis under his Ombudsmanship on the identification of systemic problems, that he might look at this at some future time and report back to us, or may include it in some future recommendation?

Dr. Hill: Absolutely.

Mr. Philip: I had some other questions on Dr. E's report. It says, "All we can say from a medical point of view"--I am reading from page 47--"is that this workman's vascular tree was in a very precarious state at the time of his collapse."

From the information we have been supplied, I am wondering what is precarious and what evidence there was that you actually would accept that it was precarious or that Dr. E would accept as his evidence of precarious.

Mr. Emmink: I can answer that, Mr. Philip. I believe the medical opinions in the file generally agree that this man did have very extensive pre-existing atherosclerotic heart disease or coronary vessel disease, or hardening of the arteries, I suppose it is. I think this is why Dr. E made that comment.

Mr. Di Santo: Is that what is called hypercholesterolemia?

Mr. Emmink: That is an increase in the cholesterol levels in the blood. Dr. McCracken can correct me if I am wrong.

Mr. Philip: But he had been treated for that.

Mr. Emmink: We know it was recommended that he go on a

diet. We do not know whether he actually went on that diet and stayed on the diet.

Mr. Philip: We do know that diets can, in fact, reduce cholesterol levels. Obviously, if he was told he was in trouble, he most likely would--

Mr. Emmink: I know a number of individuals--

Mr. Philip: You are hypothesizing and so am I. I am only saying that your hypothesis and mine are equally ill-informed.

The Acting Chairman: I am not sure how this is bearing on where we are going. Have you any more questions?

Mr. Philip: The fact is that he put something on the record and I think he cannot say one way or the other. "The fact that the man made no complaint and handled the job so capably throughout could indicate that the vascular accident was a fortuitous event." Could it not also be an indication that he simply internalized it and that the stress had increased over a period of time and that might bring on a heart attack? Might that not be an equally valid conclusion from that?

Mr. Emmink: If you accept there was stress, yes, I suppose you could arrive at that conclusion.

The Acting Chairman: Do any other members have a question? If not, we will turn it over to counsel who has a couple of questions.

Mr. Bell: Members of the committee, would you turn to page 2 of your material and, Mr. Emmink, would you as well. Pages 2 and 3 contain the decision itself, which is the subject of the investigation and the recommendations. I think we should look at that for a while.

4 p.m.

This is the decision that changed, reversed if you will, the appeals adjudicator's decision. On the second page, the third last paragraph starting, "The appeal board has considered"--are you there?

Mr. Emmink: Yes.

Mr. Bell: "--the presentations made at the hearing." Do I take it the "presentations" referred to are the evidence of various witnesses of fact whose testimony is highlighted and summarized earlier in the decision, and of Dr. C, who submitted his lengthy brief?

Mr. Emmink: That is correct.

Mr. Bell: May we take it that Dr. C was the only--

Mr. Emmink: May I correct you there? When it says "presentations made at the hearing," it refers to the appeal board

hearing, not the appeals adjudicator hearing.

Mr. Bell: No, that is my point. May we take it that Dr. C was the only medical expert who attended the hearing and made submissions in person?

Mr. Emmink: He is the doctor who attended the hearing, that is correct.

Mr. Bell: The only one?

Mr. Emmink: The only one, yes.

Mr. Bell: It then goes on to say the appeal board considered the evidence on record. What is the record?

Mr. Emmink: This file.

Mr. Bell: May we take it that the board considered all aspects of that record?

Mr. Emmink: I believe so, yes.

Mr. Bell: And that record includes memorandum 15 of Dr. E?

Mr. Emmink: Yes.

Mr. Bell: Do you know to what extent the board considered memorandum 15?

Mr. Emmink: It considered it to an extent sufficient to prompt it to have a discussion with Dr. E to try to sort out what the situation was.

Mr. Bell: As a result of that discussion, Dr. E changed the minds of the board members?

Mr. Emmink: That is correct.

Mr. Bell: Regrettably, from your position, not recorded?

Mr. Emmink: That is correct.

Mr. Bell: Was there ever any opportunity to inform the representative of the workman of that conversation and to permit the workman to make certain submissions or have his or her conversation with that doctor?

Mr. Emmink: There was the opportunity, but it was not taken advantage of.

Mr. Bell: Do you mean the workman was notified the board was going to--

Mr. Emmink: No, the board had an opportunity to do that, but did not.

Mr. Bell: There are a few principles of law I can think of that have been offended by that conduct.

Mr. Emmink: Yes.

Mr. Bell: You are not a lawyer, but I think you can think of the same ones.

Mr. Emmink: Yes.

Mr. Bell: Is it fair to say that is inappropriate behaviour for an appeal board or any of its commissioners?

Mr. Emmink: I would hope that where something such as that takes place and a medical opinion is arrived at after the hearing, the worker, the employer and their representatives would be given an opportunity to become acquainted with that and to make submissions on it. That is a deficiency we recognized and that we are trying to rectify.

Mr. Bell: I am sure you can assure the committee that if you have anything to do about it and if Mr. Warrington has anything to do about it, that conduct will not happen again.

Mr. Emmink: I think I can speak for Mr. Warrington and say yes.

Mr. Bell: Yes, I think you can, too. Looking through the next two paragraphs in the board notes, there is this reference in the first subparagraph, "The evidence adduced at the hearing is at variance with the evidence previously on record."

May we take it the reference to the variance is in respect of the physical nature of the work?

Mr. Emmink: It is in respect of the perception of the one witness that the job was stressful for Mr. N. The evidence adduced from the employer at the appeal board hearing was that this person would not be in a position to make that judgement.

Mr. Bell: All right. Was there any evidence tendered or led before the board to contradict the statement about the stressful nature of the job as found in the appeals adjudicator's decision?

Mr. Emmink: I do not believe the appeal board was ever satisfied the job was stressful. It may have been a conclusion that the appeals adjudicator came to, but it is not one the appeal board came to.

Mr. Bell: All right. That is fair. The next paragraph--

Mr. Di Santo: I have a question. Since the appeal board changed the opinion because there was no stressful situation, the question is, was there any evidence at the appeal board hearing that the work was not stressful?

Mr. Emmink: It was a situation of a lack of evidence of it being stressful.

Mr. Bell: May we take it that these two subparagraphs are the two principal reasons for the board giving the decision that it did, which in effect reverses the appeals adjudicator?

Mr. Emmink: Can you give me a minute on that one?

Mr. Bell: Sure.

Mr. MacQuarrie: It would appear that these were dealing with specific points, but when it comes to its conclusion, it says: "On reviewing all the circumstances of the case...." I do not necessarily read into this the fact that they confined themselves simply to those.

Mr. Bell: That is a fair comment, but can we take it that they are least two factors that the board did base its decision on? The relative importance, we can all speculate on.

Mr. Emmink: Yes, that is right. If there were more, they chose to place these two in their decision.

Mr. Bell: Okay. Let us look at the second one. "It is considered that the work performed was not unduly strenuous having regard to Mr. N's prior history of performing this work for a number of years without incident."

Can we take it, from what you have read to us today and what we have heard from other sources, that the board was in error in noting that this man performed this job for a number of years without incident?

Mr. Emmink: If it refers to his work on the options job or the deck-lid letters, however you choose to call it, then yes, that is an error. If it refers to his job in an assembly-line environment, then it is accurate.

Mr. Bell: All right, but whatever, we are not in any dispute that the particular job he was performing at the time he collapsed at work was done over a nine-month or 10-month period.

Mr. Emmink: That is correct.

Mr. Bell: I do not have any more questions.

Mr. Chairman: I am just curious about one thing, Mr. Emmink. I think Dr. E is the board's consultant in industrial disease, and you mentioned that the adjudicator in reaching a decision asked Dr. E to provide him with an opinion.

Mr. Emmink: Yes, he did.

Mr. Chairman: That apparently was one of the reasons, in any event, that he supported the claim. Maybe this not a matter of course, but I was just wondering why it would not have been a matter of course to provide that to the appeal board?

Mr. Emmink: Which evidence?

Mr. Chairman: Dr. E's.

Mr. Emmink: It was. Dr. E's opinion was available to the appeals board.

Mr. Chairman: From what you indicated earlier, I thought it was not.

Mr. Emmink: Oh no, it was. That formed a part of the record, and the appeal board of course had the record before it, including that opinion from Dr. E.

Mr. Philip: Did Dr. E have a conversation afterwards?

Mr. Emmink: That is right.

Mr. Philip: It was not on the record.

Mr. Emmink: That was not on the record.

Mr. Philip: That is where the chairman probably got confused.

Mr. Chairman: Not really, because Dr. E supported the claimant.

Mr. Emmink: That is correct. Yes.

Mr. Chairman: Mrs. Catton, do you have some response in regard to that?

Mrs. Catton: No.

Mr. Chairman: Is there any additional question?

4:10 p.m.

Mr. Philip: There is one that was supposed to be answered and they were looking it up. Have you found out whether Dr. E had in the report anything related to the time factor at which this fellow was working?

Mr. Emmink: I am sorry, Mr. Philip, I have not been able to nail that down precisely.

Mr. Philip: It was not in the job description that you read?

Mr. Emmink: No, not in that part, but the notes are rather extensive. In trying to follow the proceedings, I have not been able to come up with it.

Mr. Philip: Similarly, there was no indication that she had the information that Mr. N was in fact loading as many as 11 separate items?

Mr. Emmink: Are we talking about Dr. E, the board's doctor?

Mr. Philip: Yes.

Mr. Emmink: She would have had that, because I think that was on the record. I thought your question referred to whether or not Dr. D had it.

Mr. Philip: Oh, okay.

Mr. Emmink: I can appreciate that you consider this an important point. If you like, I will certainly spend the time afterwards to try to nail it down and report back to you on it, unless the Ombudsman can assist in that regard.

Mrs. Catton: The question is, did Dr. D, the cardiologist, mention the time factor in his report?

Mr. Emmink: I can answer that. He did not mention it in his reports.

Mr. Philip: The question was whether he had a complete job description, including the time factor and the potentially high number of items that would have to be handled in that short time.

The other factor is the fact that he did not have any breaks--two breaks other than the lunch break?

Mrs. Catton: On a 10-hour shift, he had two breaks prior to lunch and two breaks after lunch. On an eight-hour shift, he had one break, lunch, and another break.

Mr. Chairman: No additional questions? Mr. Emmink, would you like to sum up?

Mr. Emmink: Thank you, Mr. Chairman.

The board has taken the position that to conclude that Mr. N's stroke arose out of his employment, it must be established that his work subjected him to stress of sufficient severity to have caused his stroke. Stress measurement is a highly complex technological and biochemical process and has not been carried out in this case. No one has measured the stress.

I took note, and I was rather astounded to hear, that the Ombudsman placed before you evidence to the effect that this man did not have high blood pressure. High blood pressure is one of the primary criteria for determining whether somebody is subject to stress. If a person is working under stress, he has high blood pressure. This man, according to the Ombudsman, did not have it.

The committee members may ask that if stress was not measured, how can the board say he was not subject to stress? That would be a reasonable question if there had not been another cause for the stroke. The other cause, of course, would be, as Dr. McCracken outlined to you, the coronary artery disease.

The board contends that the stroke in this case was not the result of stress, that stress has not been established and that

the cardiovascular or cerebral vascular accident that occurred was a natural event in the progression of this man's coronary artery disease.

Those are my comments. I have nothing further to add.

Mr. Chairman: Thank you. Dr. Hill?

Dr. Hill: Mr. Chairman, I am just taking a few little notes here.

Gentlemen, we are once again faced with a systemic problem, the type that I mentioned in my opening statement a few days ago. In other words, this is simply not a case in which there is conflicting medical opinion. No one is able to measure stress itself; therefore, I believe the preponderance of medical opinion in this case--and we have to rely on that--is supportive of Dr. N's claim.

The difference of opinion over whether Mr. N's job was strenuous seems to be at the root of some of the difference of medical opinion. From the detailed description of the job, which you have heard, I think it is reasonable to conclude that it was indeed strenuous. I ask you to consider the evidence presented to the board and to find that Mr. N's claim is firmly supported. That is my final comment.

Mr. Hennessy: What is the number?

Mr. Chairman: We are still dealing with the last case. Dr. Hill is summing up his views on it.

Mr. Emmink: I have a quick comment. Dr. Hill has said there is no way to measure stress. In fact, there are a number of ways to measure stress. There are many and they are varied. Some methods are more reliable than others. The test of measuring blood pressure is one of the more reliable ones.

Mrs. Catton: To clarify, there are methods to measure the effects of stress, but not stress itself. It is not like noise. You can say the noise is 90 decibels. You can say it is stressful and you can have studies that show the effects of that situation. But you do not have anything that measures stress. There is no standard for a 10-stress level. It does not exist.

Mr. MacQuarrie: What about the stress test such as the treadmill where you walk along and they check your pulse, blood pressure and everything else?

Mrs. Catton: They are checking your reactions to physical activity--the effects.

Mr. MacQuarrie: That is right. A person in comparatively good shape and having done a job for a comparatively long period of time simply does not show the same effects as a person who is overweight and fresh from a sedentary job.

Ms. Bohnen: If someone had run that kind of test on Mr. N while he was on the assembly line, it probably would have been extremely useful evidence, but nobody did.

Mr. MacQuarrie: Maybe he was running it on himself by the fact that he was doing the job.

Ms. Bohnen: We know he collapsed on the job too.

Mr. Van Horne: Supplementing these observations, I retrieved from our library today a Maclean's article of July 2, 1984, entitled "The Silent Killer."

Mr. Philip: Are you introducing new evidence?

Mr. Van Horne: I submit that the experts agree to disagree. It is an interesting article, which I commend to anyone who wants to get another view.

Mr. Hennessy: This is something that may or may not make some sense. What is the percentage of heart attacks in that line of work?

Mr. Chairman: In the auto industry?

Mr. Hennessy: Something like that to give an idea.

Ms. Bohnen: We do not know. We have no idea.

Dr. Hill: I have an aside. I hope to be meeting with board officials, with my staff and theirs, next Wednesday to discuss this problem of conflicting medical evidence and to see whether we can start resolving this. We are going to take a crack at it next Wednesday.

Mr. Bell: The committee should come to that meeting. It would help us out.

Mrs. Catton: I wonder whether the committee can ask the board when it can expect a response on the two outstanding issues.

Mr. Chairman: You are jumping ahead of us. That concludes the final Workers' Compensation Board case. As Mrs. Catton was suggesting, we are going to ask Mr. Emmink if he can deal with the outstanding matters now.

Mr. Emmink: I apologize for not getting back to the committee on those items sooner. As the members may know, the board's counsel has been rather heavily involved in the activities taking place next door, to the extent that I have trouble getting him on the telephone. I have not been able to speak to him about that. I also have not received a copy of Hansard, which I would like to have to place before him.

On the other matter, the comments of the Ombudsman concerning that outstanding case and the question of benefit of doubt, one of the commissioners on that hearing has been in the hospital and I have not been able to get the panel together, which I would like to do to get their views on it before I report back to the committee.

I would be perfectly willing to appear before the committee to do that in person or to make a written submission to the

committee on both those cases and, of course, give the Ombudsman a copy of any submissions I make.

Mr. Bell: Mr. Arnott can show you a copy of the committee's schedule next week or even the week after. My preference is for you to come back in person rather than give us some more written stuff. Can we leave it that you will liaise with him and settle a time when you can come back?

Mr. Emmink: Certainly.

Mr. Bell: Before we go, we have had five tough cases where there is competing medical evidence. Has anyone any helpful suggestions to this committee on how it might go about wrestling with that evidence other than what you have already told us?

Mrs. Catton: When we assess medical evidence, we make sure it is factually correct, based on the right evidence, and we make sure there is a reason for the opinion and that the reason makes sense. Those are the only guidelines I could suggest to you.

Mr. Bell: Is it agreed that the committee has to examine all the evidence available to it and come to its own conclusion on the evidence and then see if that conclusion compares favourably with one side or the other?

Ms. Bohnen: I think you know we do not share that opinion.

Mr. Bell: All right. Then what do we do?

Ms. Bohnen: I have not had a chance to check the committee's earlier reports today, but in one of your earlier reports you talked about the approach you will take to Ombudsman complaints and the evidence the Ombudsman relied upon. I am going to find that.

Mr. Bell: That simply says we will satisfy ourselves that you have fulfilled all your statutory obligations, and if you have, prima facie, the recommendation will be supported.

Ms. Bohnen: Yes. What we have done in the past few weeks--the past few days; it just feels like weeks. One of the things that strikes me about it is that we have been doing exactly what it was agreed the committee and its subcommittee on communications from the public would not do in relation to complainants who complained that the Ombudsman had not supported their case.

In other words, you are sitting more or less as a trier of facts, redeciding the very same issue the Ombudsman had to decide. I do not think we are prepared today to give you an alternative, but to express reservations about that procedure.

If you are acting as a trier of facts again on the same evidence, then logically you would think you would be hearing every complainant who did not like the Ombudsman's opinions. I know you do not want to do that. because it would never end.

I guess I am saying I share your reservations for a lot of reasons. This is not the best procedure for the committee to follow. Over the next couple of weeks, I hope in concert with the board, we may be able to suggest something else.

Mr. Emmink: I appreciate the committee's problem, and I certainly do not envy it in having to decide on some of these cases. In some cases, the problem is not too difficult. You have medical evidence for and against, and it is a question of deciding which is better or more preponderant or whatever. There may be other cases where the committee is simply unable to decide which is better. I suppose those are the cases which are going to be an agony for you to look at.

This is right off the top of my head, and I do not know if it is even appropriate, but is there anything that would prevent the committee from obtaining its own medical advice on some of these matters?

Mr. Chairman: There is a psychologist some people would like to hire, but that is something else again.

Mr. Bell: We all need psychiatrists right now, I think.

Mr. Emmink: I throw that out for whatever it may be worth, but it may be totally unfeasible.

Mr. Philip: Are we going to meet in camera now or wait until next week?

Mr. Chairman: I think we had better wait until next week. I would certainly like to see a more significant turnout of our members before we deal with these.

Mr. Philip: We have a problem. Mr. Cooke will be here, and he has not been through those cases.

Mr. Chairman: We agreed at the outset that we would adjourn normally at four. We have gone to 4:30 p.m. to complete this case today, and since it is the end of the week, I do not think it would be appropriate to attempt to deliberate them now.

We can certainly give you notice, if you would like to be present. You are just serving on another committee, are you not?

Mr. Philip: Yes, except they are debating a report that was obtained from the Provincial Auditor, based on my motion.

Mr. Chairman: We will make you aware of it and if you can attend, fine.

Mr. Bell: Before we leave, may I just on the committee's behalf, I am sure, thank everyone at the front table and those who have participated for this week. It has been a tough week and if we ever all agreed around here, something would be wrong. I do thank everyone for the assistance that has been given. Dr. McCracken as well has been very helpful. We have done a lot of work in three and one half days. Our thanks.

Mr. MacQuarrie: Mr. Chairman, I would heartily endorse counsel's views. I think both the government organization and the Ombudsman have stated their respective positions quite ably and fully and obviously have pursued their respective positions with quite some diligence.

Mr. Emmink: Thank you very much.

Mr. Chairman: Dr. Hill, we will see you and your staff on Monday afternoon at about 2:15 p.m.

Dr. Hill: I would just conclude by saying it has been a helpful, educational experience for a neophyte Ombudsman.

The committee adjourned at 4:27 p.m.

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SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
MONDAY, SEPTEMBER 17, 1984



SELECT COMMITTEE ON THE OMBUDSMAN

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Sheppard, H. N. (Northumberland PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon

From the Office of the Ombudsman:

Hill, Dr. D. G., Ombudsman
Zacks, M., Director, Legal Services

From the Ministry of the Environment:

Khoorshed, M. F., Counsel, Legal Services Branch

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Monday, September 17, 1984

The committee met at 2:25 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: Can we come to order, please. This afternoon we are going to be dealing with recommendation denied, summary 10, the Ministry of the Environment. Representing the ministry today is Mr. Khoorshed, the solicitor of legal services to the Ministry of the Environment. Welcome to the committee. I will ask our counsel, John Bell, to lead us into this case.

Mr. Bell: Thank you, Mr. Chairman. There are really two levels of issues in this case. Maybe a couple of comments will assist you and those appearing this afternoon.

The first level is the merits, if you will, of the issue the Ombudsman raises with the ministry, that is: in a proper circumstance, can interest be payable and recovered pursuant to the provisions of the Public Works Creditors Payment Act? The Ombudsman says, yes, it can. The ministry's position has historically been one in the negative.

The second level is perhaps more difficult, that is, whether the ministry has already implemented this recommendation or at least is of a mind that it would implement the recommendation, and a corollary of that perhaps is whether the issue of that interest claim has already been resolved by and on behalf of the parties at a certain proceeding.

I make those comments, Dr. Hill, Mr. Zacks and Mr. Khoorshed, for your benefit partially, and would ask you, if you have not already decided, to pay particular attention to those two levels. With that introduction, Dr. Hill, could you begin?

Dr. Hill: Thank you, Mr. Bell, members of the select committee, Mr. Chairman. Summary 10: In 1972 and 1973 the complainant rented construction equipment to a contractor hired by the Ministry of the Environment to construct the sewer system in a small Ontario town. In September 1973 the ministry stopped the construction project because of difficulties with the contractor.

The complainant made a claim under the Public Works Creditors Payment Act to the ministry for rental charges still owing to him by the contractor. The claim was reviewed by the ministry and it was decided in 1975 that the complainant was not entitled under the legislation to compensation.

The complainant complained to the Ombudsman in November of 1976. The investigation was initiated and a report was issued by my predecessor, Mr. Morand, in January 1979. In this report Mr. Morand concluded that the decision of the minister not to accept

the complainant's claim under the Public Works Creditors Payment Act was a mistake of law.

Mr. Morand then recommended that the minister accept and consider the complainant's claim as one properly made under the provisions of the Public Works Creditors Payment Act. The minister did this and a hearing was convened before an adjudicator in October 1979 who gave his decision in February 1980. The adjudicator recommended that the minister pay the complainant's claim of \$27,730.30 for rental charges but recommended that the minister not pay the claim for interest or legal costs which the complainant also requested. The minister accepted this recommendation.

The complainant was dissatisfied with this decision and again complained to Mr. Morand. A second investigation was initiated on the minister's refusal to pay him the legal costs incurred in pursuing this claim against the ministry and interest on the rental charges.

2:30 p.m.

Mr. Morand did not support the complaint about legal costs but did support the complaint about the interest. In his report of April 22, 1982, Mr. Morand concluded that the minister's decision that he lacked the authority to pay interest under the Public Works Creditors Payment Act was based on a mistake of law.

In addition, Mr. Morand concluded that the minister unreasonably exercised his discretion in considering the complainant's claim for interest under the Public Works Creditors Payment Act.

Mr. Morand recommended that the minister cancel his decision to accept the recommendation of the adjudicator not to pay the claim for interest, and that the minister accept and consider the claim for interest as one properly made under the provisions of the Public Works Creditors Payment Act. In other words, the minister should accept that a claim for interest may properly be made under the law and consider the complainant's claim on the merits.

Mr. Bell: Dr. Hill, I am sorry to interrupt you, but it is important to the committee members that they get an understanding of what the two parts of the recommendations mean, as far as you, the Ombudsman, are concerned.

Am I correct, sir, that what you have just said does not include a requirement of the ministry that it pay this gentleman an amount representing interest owing on the principal?

Dr. Hill: That is correct.

Mr. Bell: What you are asking them to do is, first, to accept in principle the question that interest is payable under the act, and second, having accepted that, consider this man's claim on its merits.

Dr. Hill: That is right.

Mr. Zacks: That is the same type of recommendation that was made in the first report in terms of the principal amount.

Mr. Bell: We will get to that later. I wanted to make sure that the committee members fully understand what it is you are asking, because it may have some bearing on our discussions with Mr. Khoorshed later.

Dr. Hill: In other words, the minister should accept that a claim for interest may properly be made under the law and should consider the complainant's claim on the merits, as we were just saying. Mr. Morand decided not to report this case to the Premier (Mr. Davis), but included it as a detailed summary in his annual report.

When I was appointed Ombudsman, the complainant wrote to me asking me to forward this matter to the Premier and to this committee. I considered Mr. Morand's report and concluded that there was merit in this case, and that the complainant should have his case considered by this committee.

Mr. Chairman: Are there any questions of the Ombudsman at this point?

Mr. Di Santo: For the time being, I would like to ask this: When you say that the fact the minister did not pay interest is a mistake of law, what does that mean?

Mr. Zacks: Among the things the minister said to the Ombudsman in this investigation is that, in any event, he could not pay interest under the relevant legislation because the legislation did not provide for it. We are saying that is wrong and is a mistake of law.

The legislation does provide for the payment of interest in appropriate circumstances, possibly such as this circumstance where interest is part of the obligation owing by the contractor to the renter.

Mr. Di Santo: I think I understand the argument you are making. You are saying that, if a contractor owed money to the complainant and did not pay the money, he would also have paid the interest in the final analysis, so the minister should also pay the interest.

Mr. Zacks: If that was part of the agreement between the two parties, that is right.

Mr. Di Santo: Is there a section of the Public Works Creditors Payment Act that states what you are saying?

Mr. Zacks: I will read the section I think is applicable and the one that the Ombudsman considered. It is subsection 2(1) and it is attached to the material.

Dr. Hill: You have a copy of it, Mr. Di Santo.

Mr. Di Santo: No, we do not.

Mr. Zacks: I thought it was attached to the detailed summary.

Mr. Di Santo: Oh yes.

Mr. Zacks: Subsection 2(1) says, "Where a contractor does not pay a creditor in accordance with his obligation so to do..." We are saying that in this case there appears to be an obligation on the part of the contractor to pay the creditor who is the complainant. If there is such an obligation to pay, then the minister can pay interest, if that is part of the obligation. Does that answer your question?

Mr. Di Santo: That is the crux of the matter.

Mr. Zacks: It does not use the term "interest."

Mr. Zacks: It does not use the term "interest."

Mr. Di Santo: I do not know what the agreement was between the contractor and the creditor. What was the agreement?

Mr. Zacks: The agreement, as we understand it, was that the amounts owing for rental were due within 30 days and, if they were not paid, then there was an interest charge owing on the outstanding balance, which I think was 18.5 per cent.

Mr. Bell: I think Mr. Di Santo is asking you specifically if you have a copy of or if you had reviewed an actual copy of the agreement during your investigation.

Mr. Zacks: We have copies in our file of invoices. There is no actual written contract stipulating all the terms, but the invoices are there and they make clear reference to them.

Mr. MacQuarrie: Was there an understanding on the part of the contractor that he was to pay interest, or was this just simply a provision attached to the bottom of the invoice saying: "Terms: net 30 days. Anything in excess of 30 days, interest at 1.5 per cent a month"?

Mr. Zacks: That is basically what the invoices say. We made no investigation into the merits of this complaint, and that is why there is the issue of whether the ministry should pay. The merits of the interest claim have not been considered by us, and that is why no recommendation was made on payment of interest per se.

Mr. MacQuarrie: You see, I have some difficulty in my mind about finding in some of these invoice charges where a contractor makes a deal with a subcontractor and he says in effect, "The rental for this equipment is going to be X dollars per hour, period." That is the deal. Then along comes the invoice, and most guys invoice before their 30-day period is up, and tacked

onto the bottom of the invoice is: "Terms: net 30 days. Anything in excess of 30 days, interest at 1.5 per cent." Is that part of the contract?

Mr. Zacks: We never did an investigation--

Mr. MacQuarrie: Or is this a supplementary term that the--

Mr. Zacks: I cannot answer that question for you, because we never investigated that aspect of it. It was always the Ombudsman's view--

Mr. Di Santo: We understand; I think I understand that part.

Mr. Zacks: I know, but not everybody here--

Mr. Di Santo: You are not getting into the merits of the claim as such.

Mr. Zacks: That is right.

Mr. Di Santo: We are trying to set the principle. From what I understand now from our conversations, while you have the section of the Public Works Creditors Payment Act, which is very clear--in fact, it says when the contractor does not pay in accordance with his obligation to do so--it is my impression that you made a deduction from the type of bills you had that the interest was part of the obligation, but you did not have a very clear understanding, like an agreement or a clear document, that tells you that in fact the contractor's obligation was also to pay interest.

Mr. Zacks: We never did an investigation of that. No, we do not have any information about that. We never questioned the contractor on the point. We never pursued any kind of in-depth investigation on the merits of this issue. The investigation was not focused on the merits; it was focused on the legal issue of whether interest was payable, and the Ombudsman believed that the minister should determine the merits of it, as he did in the issue of the principal.

Mr. Di Santo: Yes, but if you did not have any document that told you there was an obligation on the part of the contractor to pay interest, on what did you base your assumption?

Mr. Zacks: On the actual invoices, and also on the assertions of the complainant.

Mr. Di Santo: And what do the invoices say?

Mr. Zacks: Basically as Mr. MacQuarrie indicated. I will find it and read it to you.

Mr. Cooke: The point you are making is that the minister said he did not have the authority to pay it.

Mr. Zacks: That is right.

Mr. Cooke: And you are saying he does have the authority and that the minister should make the decision on the basis of the assumption that he has the authority and not by using some legal way out.

Mr. Zacks: Yes.

Mr. Di Santo: Obligation again---

2:40 p.m.

Mr. MacQuarrie: This is, of course, the key question: whether there is an obligation. A person cannot unilaterally impose interest charges.

Mr. Sheppard: Mr. Chairman, can I ask a supplementary? The minister sometimes recommends paying interest and other times does not. Can I ask why?

Mr. Chairman: Mr. Sheppard, may I suggest that after we finish questioning the Ombudsman we give Mr. Khoorshed an opportunity to make some comments and ask him questions. We will give you the first opportunity.

Mr. Khoorshed: I have all the time you need.

Mr. Zacks: I am still looking for the invoices, but basically the bottom of the invoice says that the amount is owed for 30 days, and after that there is interest on a monthly rate period. Here it is. "Overdue accounts, 1.5 per cent per month; terms, net 30 days." I am advised by one of my colleagues that apparently there are signed contracts that the renter executed with the contractor.

Mr. Bell: Has your office ever examined them?

Mr. Zacks: No.

Mr. Bell: You are not able to tell us today whether there is a provision for payment of interest in the contracts themselves.

Mr. Zacks: I have never seen them. We never looked for them. We never asked for them.

Mr. Bell: Would it make any difference whether or not there was a provision in the contract for payment of interest?

Mr. Zacks: Certainly. I would think it is something that the minister should insist on having to satisfy himself whether he should pay any interest.

Mr. Bell: You did not get the point of my question. This is hypothetical. If there is no provision in the contract for the payment of interest, would that have any effect on your conclusions and recommendations?

Mr. Zacks: If the Ombudsman could reopen this investigation and investigated the issue as to how much interest is owing, then if the Ombudsman was satisfied there was no agreement for the payment of interest, obviously he could not support the complaint.

Mr. Di Santo: He could not support the complaint?

Mr. Zacks: I do not know how he could do so on the question of whether interest was owing, but no such investigation was done. The previous Ombudsman did not direct himself to that issue. He simply looked at the decision made by the adjudicator and the minister, which was that interest is not payable in any event and concluded that is wrong in this case.

Interest may be payable. It is a mistake of law to interpret the legislation as saying interest is not payable at all. Therefore, reopen this matter and direct your mind to the issue and consider the merits of it. The Ombudsman did not want to pursue the merits. He thought the proper venue was for the minister to make that decision for himself, exercising the discretion that the minister has.

Mr. Van Horne: Maybe it is not important, but in response to a question put by our counsel as to whether there was a contract or whether you had seen one, the response was no, but your colleague had. Then you said, "Has the office?" I assume that means the Ombudsman's office and, therefore, if your colleague has seen it, someone in the Ombudsman's office--

Mr. Zacks: My colleague saw it. The complainants were sitting in the back of the room, and he leaned over and told Linda Bohnen that there is such a document and she passed the message to me. I have never seen it. All I have from this file are invoices. We never asked for such documents. It was not part of the investigation. There was never intended to be an investigation of that scope.

Mr. MacQuarrie: Let us set aside for a moment the aspect as to whether interest was properly chargeable in the initial contract or not.

I looked through the material. There is the decision of the adjudicator, Mr. Heller, where he sets out reasons for not accepting interest and then recommends payment in the amount of at least \$27,730. Then in a letter, ostensibly originating with the solicitors for the claimant, they enclose a draft release for perusal and approval, and they request the ministry to advise if it wants any changes made, and the draft release is enclosed with that letter. Was this solicitor present at the hearing before the adjudicator?

Mr. Zacks: Yes, he was.

Mr. MacQuarrie: Was the solicitor in this case acting within the scope of his authority and authorization from the complainant?

Mr. Zacks: Yes, he was.

Mr. MacQuarrie: So when he says, "I shall look forward to the receipt of the ministry's cheque in settlement of this claim pursuant to the decision of the adjudicator," he means it?

Mr. Zacks: He does, except this is not the release that was signed.

Mr. MacQuarrie: Let us not get into it. I realize a subsequent release was prepared and signed. This is the document that came right immediately following the hearing; is that not correct?

Mr. Zacks: Not immediately, but I believe six months afterwards; yes, that is right. If you are asking whether the solicitor reflects a waiver by the solicitor of the costs and the interest component of the claim, we addressed that in our investigation. Mr. Morand concluded based on his review and inquiries that there was no such waiver, not of a nature to prevent him from making the recommendations he did.

We questioned the complainant on the issue of a waiver and he denied it. We questioned the company lawyer on the issue of waiver, and he denied it. We examined the report issued by the adjudicator, and there is no mention there at all of waiver. Mr. Khoorshed will address that.

We also sent the adjudicator a copy of the section 19(3) letter setting out our conclusions. There was no mention of waiver at all. Based on those factors, Mr. Morand concluded that there was no such waiver.

Mr. MacQuarrie: Did a cheque for \$27,730.30 issue to the complainant?

Mr. Zacks: Yes, it did.

Mr. MacQuarrie: When did it issue?

Mr. Zacks: It issued in February 1981, I believe. There was a release signed releasing the ministry's interest subject to the complainant making his claim for costs and interest. It was a conditional release and accepted by the ministry.

Mr. Chairman: Are you finished, Mr. MacQuarrie?

Mr. MacQuarrie: For now, Mr. Chairman.

Mr. Di Santo: I thought it would help us if we could have a copy of the contract because at this point it would be easier for us to make a decision.

Mr. Bell: Mr. Di Santo, I would prefer you not have a copy of it for this reason: The Ombudsman has made it very clear that his recommendations do not go to the merits of the issue; he wants the ministry to consider the merits. If you should concur with the Ombudsman on that recommendation and the ministry does

consider the merits, that could take the form of some process. I would be concerned if this committee were to be discussing and perhaps commenting upon that very issue. It might prejudice the position of one or both of those parties.

I guess another way of saying that is it is not relevant in my mind for you to decide whether these recommendations should be supported, whether or not the contract provides for interest.

Mr. MacQuarrie: I am glad that was clarified, Mr. Bell, because the concluding paragraph of the Ombudsman's report left me rather uncertain as to what exactly the Ombudsman wanted.

Mr. Bell: Dr. Hill confirmed that earlier. Mr. Di Santo, I think it would be a distracting document for you, frankly, on the issue of whether the minister should deal with this issue on its merits. I think there are lots of merits on both sides.

Mr. Di Santo: The reason I was saying that was if we establish that there was an obligation on the part of the contractor to pay interest, it would be helpful for us to decide whether the ministry should pay interest without going into the merits of how much it should pay.

2:50 p.m.

Mr. Bell: I think, though, if you address the question of whether there is an obligation to pay interest, you will be addressing the merits. What if the contract is silent? I am concerned that we not discuss something that may be before some tribunal.

Mr. Di Santo: If the contract is silent, then how do you interpret subsection 2(1) of the Public Works Creditors Payment Act?

Mr. Bell: You do not have to interpret it to support or not support the Ombudsman's recommendations. All you have to consider in general terms is whether interest is an amount that could be properly payable given the appropriate circumstances under that act. I would say that is the fundamental question. If you concur that it is properly payable in the appropriate circumstance, I do not think it is going to take an awful big jump for you to say to the ministry, "Go and consider it on the merits, if you have not already."

Mr. Di Santo: I do not know if that is really the case. We know other statutes. We have seen many other cases in the last week, and on the basis of the specific statute we were discussing, there was no provision at all for interest; in fact, nobody claimed interest payment. I think in this case we are considering the Ombudsman's recommendation only because there is a statute that provides that part of the obligation is also the payment of the interest.

Mr. Bell: That is a point. I have given you the caution. If you want to receive the contract and not make any comments on the merits, then that will solve my concern. I do not have anything more to say than that.

Mr. Mitchell: This may have been raised while I was out, but I would like to be sure. When this whole issue of interest is being talked about, are we talking about interest that would or should be paid by someone who is owing money as of the date of the default of the contract?

Frankly, the part on billings that showed there was 1.5 per cent per month if it was not paid within 30 days, as far as I am concerned, has no real bearing on the situation. The contractor obviously entered into the agreement to rent the equipment. I know very few contractors or people in business who do not intend to pay before that interest starts being added on. That is a cost they do not wish to absorb, nor do they necessarily want to pass it on to somebody else.

What I am concerned about is, are we merely talking about the amount of money that was outstanding totally or the balance and who had the responsibility to pay that interest?

Mr. Bell: First of all, the principal has been paid in full.

Mr. Mitchell: Yes, I am aware of that.

Mr. Bell: To make it easier, the test is that you remove the crown from this whole exercise and you presume a hypothetical where the contractor, whether or not he went into bankruptcy, remained solvent and the job was completed. The test is, you are talking about whether there are any additional moneys that this complainant could have recovered.

Mr. Mitchell: Yes, but then you are dealing with something nobody knows, because no one would be able to say. You say to assume the contractor never folded. Then you are asking somebody to make an assumption that he would never have paid the bills within that 30 days, and I think that is an unfair and wrong assumption.

Mr. Bell: No. I think it is a given fact that the account remained unpaid after the 30-day period. I do not think you have to concern yourself with that.

Mr. Mitchell: That is what I am wanting to be sure of.

Mr. Bell: It remained unpaid for some years after the fact. If the contractor had remained solvent and the bill remained unpaid for the same period of time as it did here--

Mr. Mitchell: Fair enough. Interest would have been required, at least according to the billing statements.

Mr. Bell: That is the question. Could the complainant have recovered an amount of money in interest flowing from an obligation in the contract? That is the merits you should not get into, in my respectful opinion.

Mr. Mitchell: To use the words you used the other day, Mr. Bell, "If" is a big word."

Mr. Bell: The biggest.

Mr. Chairman: Mr. Khoorshed, perhaps this is an appropriate time to hear your views.

Mr. Khoorshed: The legal issues involved in payment or nonpayment of interest are debatable. Incidentally, I was the person who advised the minister at the initial stage. I was the person who represented the ministry at the adjudication when it first took place as well as when we appointed Mr. Heller, who was the second adjudicator for the claims that were paid to the claimant.

The first and foremost thing I would like to put before you is the legal grounds on which we believed no interest or claim should be paid. As a result of further information and a further request by the Ombudsman, we submitted this matter to the minister. The minister, as you know, has total discretion under the act. The minister said: "I will re-exercise my discretion. I will pay the claim."

At that time, the mandate given to the adjudicator was to give us legal reasons, which he did. However, that is not the issue at all. It is a question of interpretation of the act as to whether interest is payable or not payable. The main problem is that it was not a situation where the adjudication was made as to the capital amount payable and then the interest was not discussed or argued. The whole amount of \$27,300 was a settlement of the claim.

Let me tell you exactly how it worked. The claimant came with a large number of items, claiming amounts on this. We are talking about years after the claim had originated when this second hearing before Mr. Heller took place. The claimant did not have all the documentation necessary and the ministry did not have all the officers necessary to decide whether a particular item of claim was accepted or not accepted. We sat down just like this, across the table, and we discussed the claim. Wherever it was reasonable, it was settled in amount. That is how we arrived at the \$27,300, not by strict proof as to each item.

At that time, unequivocally and without question, the cost and the interest were discussed and in my presence they were unequivocally abandoned by the claimant and his solicitor. In other words, it was not a situation where anybody put any pressure on them. It was a situation as follows. Suppose an item consisted of \$10,000. We would say, "Where is your billing?" "I have this billing. I do not have this documentation." "All right, let us be reasonable. What do you think is the proper amount?" "It is \$6,000." "All right. Next item."

As a result of this process, we reached the \$27,300, with full understanding that claim for interest and costs was thereby abandoned. It was not abandoned by way of charity. It was abandoned because that was the settlement amount reached. Would the claimant's solicitor draft and send us a release mentioning \$27,300 if that was not the case?

Then the Ombudsman indicated to us that he disagreed with the situation. I believe one of his arguments is, "Why does the adjudicator not mention anything specific about the abandonment of interest and claim?"

As a result of that, I checked the exact situation as to why the adjudicator did not mention it. Very specifically, it was as follows. We told the adjudicator: "We would like you to look at the law. We would like you to hear the reasoning behind the minister's decision not to give interest and not to pay the claim in the first place and comment upon it." We did not ask him to comment on what was abandoned and what was settled.

After this hearing was called, I wrote to the adjudicator. We are talking about approximately 11 years since the adjudication was made and the adjudicator has not retained his notes. I asked him whether my recollection of his opinion was correct, that the claim for interest and cost was abandoned.

This is the letter I received from him last week. May I please present this to you?

Mr. Chairman: Has the Ombudsman seen this letter?

Mr. Khoorshed: I showed it to Mr. Zacks today.

Mr. Zacks: A few minutes ago.

3 p.m.

Mr. Chairman: Mr. Zacks, before we pursue this any further, do you have any observations on this letter?

Mr. Zacks: The only observation I would like to make is that history seems to be repeating itself. We are always getting new information at this committee that we do not receive during the actual investigation. This complaint was investigated twice, and we have not received information of this quality dealing with the issue before. I am not going to say he will listen to it, because obviously it is going to have bearing on what you are going to consider. All I can say is that in 1981, when this adjudicator wrote to us about the inquiry and when I am sure he had his notes still intact, he made no mention of it; not one word was mentioned about waivers or claims being released.

Mr. Bell: Mr. Zacks, we will deal with two things. I take it you do not have any objection to Mr. Khoorshed advising this committee of what his recollection was, since I presume this would have been a matter passing between the two offices at some time before today. Or do you have an objection to that as well?

Mr. Zacks: I will not have any objection if I can have our complainant give evidence before the committee as well.

Mr. Bell: Then you do have an objection.

Mr. Zacks: Yes, I do.

Mr. Bell: What is the basis of that objection?

Mr. Zacks: The objection is that I cannot--

Mr. Bell: Let me finish, please. Are you telling this committee you were not previously aware of Mr. Khoorshed's personal recollection of the issue of settlement?

Mr. Zacks: Yes. He wrote us, I imagine through his deputy minister, some years ago saying in a paragraph or so that the issue was waived. We in our report said that, given the evidence before us, it does not appear that there was reason to assume there was a waiver.

Mr. Bell: Then how can you object today when Mr. Khoorshed, representing the ministry, comes and says the same thing?

Mr. Zacks: Because he has given you this evidence as a person who was there as a witness.

Mr. Khoorshed: Excuse me, sir. I am referring to a letter by my minister. This letter is dated September 4, 1980, addressed to the Ombudsman. I have a copy of it for your perusal if you so wish. In that letter may I point to the second-last paragraph?

Mr. Chairman: Is this in our file?

Mr. Bell: What is the date of that, Mr. Khoorshed? September 4, did you say?

Mr. Khoorshed: September 4, 1980.

Mr. Chairman: We do not have that either.

Mr. Bell: We do not have that letter. I am sorry, we are not going to expand the record any more.

Mr. Chairman: To whom was the letter directed?

Mr. Khoorshed: The letter is directed to the Ombudsman of Ontario. I am sure my friend has a copy of that letter.

Mr. Zacks: I think that letter may be in response to the first investigation.

Mr. Khoorshed: No, sir.

Mr. Bell: Just hold on for a moment, please, before we get out of hand. I want to establish a point. Was what Mr. Khoorshed indicated to this committee not 10 minutes ago always, or at material times, known by your office?

Mr. Zacks: We always knew the ministry was taking the position that the amounts had been waived.

Mr. Bell: Is that responsive to my question?

Mr. Zacks: Yes, you can take it as such.

Mr. Bell: All right. What Mr. Heller did or did not recall is new?

Mr. Zacks: That letter is new, yes.

Mr. Bell: As distinguished from what Mr. Khoorshed has told us?

Mr. Zacks: Yes.

Mr. Bell: Mr. Chairman, on the basis of that I would advise the committee not to receive that letter or its contents; it is not helpful to you.

Mr. Chairman: Is the committee in agreement with that recommendation? Mr. Khoorshed, I would ask you to disregard this letter. Do not make reference to it.

Mr. Khoorshed: Very good, sir. But the main point I am trying to make is that the abandonment was not a secret to the Ombudsman. That is even admitted by the Ombudsman in his defence or whatever you would like to call it.

Apart from that, the situation I would like to bring to your attention is that it was not a question where the claim for interest and cost was rejected by the minister's appointed adjudicator; it is a situation where the matter was settled and a release was sent to us.

Mr. Chairman: All right, fine. I think we can open this up to committee questions at this point. It might be helpful.

Mr. Sheppard: The question I want to ask, and I asked it a few minutes ago, is why does the minister sometimes recommend interest and at other times not recommend interest?

Mr. Khoorshed: I cannot answer that question in a general sense, but as far as this claim is concerned, let me assure you of one thing. It is the only claim that has ever been paid by the Ministry of the Environment under the Public Works Creditors Payment Act in which a rental claim was concerned; in other words, all other claims for rental of equipment have always been rejected. I can assure you, because I was the only solicitor who has ever done this, with the Ministry of the Environment specifically only.

This was a claim that was open and the claimant was paid. We still did not agree with the legal reasoning of the Ombudsman, but we felt that under these circumstances, perhaps the minister should look back. Maybe there was some sort of injustice. Then we took the position that we had given him this amount of money, he has settled his claim, he goes home, sends us a release, comes back and asks for an additional amount of money. So we rejected it.

Mr. Bell: In fairness, I think that question has not been answered. The question is: Have you, the ministry, paid an amount of interest as part of an amount owing under a contract, to a creditor under the act, aside from the question of whether they

are a renter, a supplier, material man, or whatever? That is the question that was asked, and I think in fairness the committee is entitled to an answer.

Mr. Khoorshed: Sir, as far as the claims under the Public Works Creditors Payment Act in general are concerned, I have no idea. I am sure there must have been. Let me tell you how these claims were settled. That is very significant. We are not talking about rental claims. We are talking about claims where the minister had decided to pay. Those claims also were settled.

I will give you one example. At the time, we appointed Mr. Nathan Strauss as the adjudicator. Now, I am talking strictly about claims that were paid. Evidence of the claim would be presented. Where there was any dispute, as much as possible the dispute would be settled through negotiation. Then an amount would be arrived at and the amount would be paid. Definitely, in many cases the amount included interest. In many other cases the amount did not include interest, so I cannot give you a straight yes or no answer.

Mr. Sheppard: Mr. Chairman, he said a few minutes ago that he was the only lawyer.

Mr. Khoorshed, are you the only lawyer? You did not get legal advice or discuss it with another lawyer to get a different interpretation?

Mr. Khoorshed: Absolutely. This decision was not reached independently by myself. There were at least three lawyers over a period of time and I will name them: Mr. Paul Currie, who has since left the government; Mr. Neil Mulvaney, who is our director; myself; and I believe to some extent, Mr. Jackson, another solicitor of the ministry. There were discussions with many outside solicitors.

Mr. Michael Heller, the adjudicator, is an independent, outside lawyer. I think we had discussed the matter with Mr. Nathan Strauss, who is a respected barrister of the community. It was not just my decision. What I meant by that was that I was the only lawyer for the Ministry of the Environment who actively represented the ministry at these hearings. That is all I am saying.

Mr. Cooke: You should have paid the claim and saved the lawyer's fees.

Mr. Sheppard: I did not want you to leave the wrong impression with this committee, that you were the only lawyer.

Mr. Khoorshed: No, I apologize if that is how it sounded. I was the fellow who represented the ministry at this hearing. There were, of course, other lawyers on behalf of other people.

Mr. Di Santo: From what you say, sir, I think we can deduce that, in fact, the government agreed that part of the obligation of the contractor was the payment of the interest.

Mr. Khoorshed: No, sir, I cannot agree or disagree with you.

Mr. Di Santo: If you are telling the committee that when there was a settlement, the settlement included all the aspects of the claim and part of the claim was the interest, then you are saying, in fact, that you recognize that once settled, it was settled in all its aspects, including interest.

Mr. Khoorshed: No, Mr. Di Santo. The purpose of the hearing was, as fairly as possible, to settle a claim where claimants were not always in a position to substantiate every piece of claim, every item of claim with evidence. In these circumstances the adjudicator, when one was appointed--very often there was no adjudicator.

For example, I was asked by the minister to determine claims, because he had the jurisdiction. How could we possibly take the claim of a claimant, a labourer or a contractor? He might not have any documentation. We would take his claim at face value, discuss it with the contractor who was often present, and make a settlement as amicably as possible. That is what I am trying to say. There was no acceptance or rejection of the principle of interest payment or not. There was no such issue at all.

Mr. Cooke: But it was discussed.

Mr. Di Santo: Let me ask in general, and I would like to have an answer which is as detailed as possible. In general terms, do you have cases when the ministry is of the opinion that interest must be paid?

3:10 p.m.

Mr. Khoorshed: Under what? Under the contracts or under the Public Works Creditors Payment Act? For rental claims or for any claims? I cannot answer that question with a straight yes or no.

Mr. Di Santo: Let me give you a practical example. If in the contract there was a provision that interest would be paid if I failed to pay within the terms of the contract, do you think the minister assumes that obligation as well?

Mr. Khoorshed: In this particular case?

Mr. Di Santo: The case I am asking about.

Mr. Cooke: Make it general.

Mr. Khoorshed: There is no contract between the minister and the claimant.

Mr. Di Santo: I am giving you a hypothetical case, that we have a contract in which there is a provision that, in case the payments are not made according to certain terms, the interest will be paid.

Mr. Khoorshed: Absolutely. My answer is yes, we would

pay interest. Let me mention that we are not talking about a contract between the minister and the claimant.

Mr. Bell: We understand that.

Mr. Di Santo: We understand that. Are you saying that the minister refuses to pay interest in this case because there is no mention in the contract?

Mr. Khoorshed: Not at all. I am not saying anything of the sort. I am merely saying that as a result of the hearing a settlement was reached in the amount of \$27,300, which was to include everything that had to be paid. As a result of that settlement, a cheque for \$27,300 was paid.

Mr. Di Santo: It is probably my fault, but I do not understand what you are saying. You said at the beginning that everything that was to be paid--

Mr. Khoorshed: Was paid.

Mr. Di Santo: If interest was part of everything, then you think the interest was paid in the settlement, that it was part of the \$27,730?

Mr. Khoorshed: That is right. That was a negotiated amount, including principal, interest and costs.

Mr. Di Santo: My original question stands. You are concurring that the interest may have been part of the settlement.

Mr. Khoorshed: Absolutely, because there are many areas where interest is possibly paid.

Mr. Di Santo: The argument of the Ombudsman is that there was no mention whatsoever of interest in the decision of the adjudicator. Both the claimant and his counsel are saying that was not part of the settlement. Do you have any evidence to prove they were part of the settlement?

Mr. Khoorshed: They were present and they drafted the release and sent the release to me. I believe I supplied the committee with a copy of the covering letter, as well as the release, sent by the solicitor of the claimant. We did not draft the release. They drafted the release.

Mr. Zacks: May I comment on that point when there is a free moment?

Mr. Chairman: Are you finished, Mr. Di Santo? Okay, Mr. Zacks.

Mr. Zacks: I think there may be some confusion as to the actual amount of money that was decided on at the hearing. If I could refer you to page 2 of the adjudicator's decision at the back of your material, it is in the second paragraph from the bottom.

Mr. Chairman: What page is that?

Mr. Zacks: It follows page 31 of your material. The decision follows and it is page 2 of that decision. In the second paragraph from the bottom the adjudicator writes:

"Following a review of the materials on October 18, 1979, I received a document filed by Mr. W with Mr. Khoorshed, the concluding portions of which are as follows: In reference to the figure of \$27,730.30, Mr. W said: 'The total unpaid balance is accurate, and includes no interest charges; the various charges making up item 4 (that being the price of rental equipment not returned) are fair, reasonable and the arithmetic is accurate.'"

There was never any interest settled on that amount of principal. That was the amount, from this decision and from our investigation, of pure rental charges.

Mr. Bell: Does that not confirm that it was resolved without interest charges? Does that not appear to be a confirmation by the complainant's lawyer that the settled amount is exclusive of interest?

Mr. Zacks: It is exclusive of interest.

Mr. Breithaupt: Why does the release not say so?

Mr. Zacks: The release says the opposite. It says the settled amount is exclusive of interest and costs. What you are seeing is a draft release that was sent by the lawyer. It was never executed and some months later a final release was sent, releasing the ministry for this amount and stating the right to proceed on the claim for interest and costs, which was the subject of our investigation.

Mr. MacQuarrie: I have some difficulty in reconciling the--

Mr. Cooke: I was going to ask about this final release, but now we are told it is not the final release.

Mr. Chairman: You came in late. We had a briefing.

Mr. Cooke: The final release that was actually signed has a qualifier on it then.

Mr. Chairman: That is right.

Mr. Cooke: What I do not understand is, if the ministry's solicitor says, "Sign the final release but there is a qualifier," how can you say it is a final release and eliminates you from any further costs with respect to interest?

Mr. Khoorshed: What happened was this. We say that originally the amount was settled without interest and costs. As a result of this, the solicitor for the claimant sent us a draft release. That draft release indicates that the whole settlement was for \$27,300.

Thereafter, I am not quite sure whether the solicitor was dropped by the claimant, or something else happened or he continued--I cannot vouch for that--but for whatever reasons, the claimant then changed his mind, we feel, and said that he was entitled to interest and costs. At that point, originally our situation was that we advised the minister that nothing should be paid until this matter was completely settled. If I am not mistaken, the Ombudsman's office again got involved.

Mr. Breithaupt: Had the \$27,000 been paid?

Mr. Khoorshed: Nothing had been paid. My position was that as the settlement was for \$27,300 we should have a token release, and only then should the cheque be sent out. However, I believe some representations were made. I do not know exactly how much the Ombudsman was involved in it; I think he was quite involved in it. I think he stated that it would not be fair for us not to pay the \$27,300. We should pay the amount and then talk about interest and costs. I would reiterate that I do not recall whether it was the Ombudsman who suggested that or whether somebody else made a representation, but as a result of that, we paid the \$27,300 and obtained a partial release. The remedy of going further and making further representations was open to the claimant. That is all.

Mr. Cooke: Then your statements earlier about the release are really quite irrelevant.

Mr. Khoorshed: No, because originally at the hearing itself the claim for interest and costs was abandoned and a draft release was sent to us. Later on the claimant changed his mind. My position is that once you settle a claim and an agreed amount is reached as to full payment, then if you go home and change your mind--

Mr. Cooke: The ministry signed it so the ministry agreed to the release, with the one area still to be negotiated.

Mr. Khoorshed: That is right. I am not saying they have no right to negotiate anything. I suppose they can come and ask for any amount of money.

Mr. Cooke: Then I do not know the point you are making.

Mr. Di Santo: You opened yourself in a sense to some civil claim by paying without having a final release. I do not think the ministry was very prudent. If you thought that was the total payment it should make, why did you not wait for the release?

Mr. Khoorshed: I cannot comment on the prudence or otherwise of whether the amount was paid or not. I think the minister decided that now that the claim was settled, we should not hold back the claimant's \$27,300. "Let him have the money and let him talk about interest at a later date."

It was against the advice given by me, but that is irrelevant. It is the minister's right to take or not to take advice.

Mr. Chairman: Out of curiosity, why does your ministry have such a problem in considering the claim for interest? Is it going to set some sort of dangerous precedent? I know you have suggested there was an agreement that the thing was settled, but I am wondering why you have such difficulty accepting the Ombudsman's recommendation?

3:20 p.m.

Mr. Koorshed: We believe that the very payment of the original capital amount was an exercise of additional discretion by the minister, but that is beside the point. That is all finished and water under the bridge.

Now our position is as follows: If every time a claim is totally settled by the claimant and his counsel and a figure is arrived at--

Mr. Chairman: The final release does not indicate this amount.

Mr. Di Santo: That is the fine point.

Mr. Koorshed: It does not. The final release certainly does not, but if as a result of negotiations you come to a conclusion as to a specific amount payable, and if every time after that specific amount is arrived at the claimant would go home and change his mind and ask for further amounts of money, what would be the situation? How would we ever run the government?

My second point is what would be the situation in this particular instance? Where as a result of, shall we say, the fairness of the minister--the only reason the \$27,300 was paid to the claimant without settling the interest issue was because he felt it was not fair to keep this money away from the claimant--he paid him. Whether that was wise or not, I cannot comment.

Mr. Cooke: Obviously, you felt it was not wise or you would not have recommended the opposite.

Mr. Koorshed: Well, sir, it is my opinion as a lawyer. I only give advice and the powers that be must decide. Perhaps they rightly decided.

Mr. Chairman: Do any other members have questions at this point?

Mr. Bell: I will refrain from giving you what my advice would be.

Mr. Koorshed, I would like you to look at the Ombudsman's recommendation. I think it is fairly set out at page 2 of the synopsis document that has been settled between you and the Ombudsman's office. I would just like to discuss, if we can, particularly what the Ombudsman has asked the ministry to do.

Dr. Hill has confirmed, unfortunately, regrettably, but the recommendation does not say this. We can argue and think for

another time whether they will say it in the future, but he is asking the ministry to do two things: One is to accept that in principle the minister may, given the appropriate circumstances, make a payment of interest under the Public Works Creditors Payment Act. Are you with me so far?

Mr. Khoorshed: Yes, sir.

Mr. Bell: From what I understand from the discussion between you and the committee members to date--this afternoon--the ministry acknowledges that given the appropriate circumstances, the minister may pay interest; "may" meaning he has the authority so to do. Am I correct?

Mr. Khoorshed: Yes.

Mr. Bell: All right. So then with respect to the first part of the Ombudsman's recommendation, it has already been done.

Mr. Khoorshed: That is right.

Mr. Bell: Okay. So we are then to the next question which is, go and consider it on the merits. The merits can include a lot of things, and I would ask Mr. Zacks to comment upon this afterwards. The merits may also include whether or not the action has been settled. It also can include whether or not there is any provision in the contract, whether there was an attempt by the creditor to impose an interest charge after the fact, which was not accepted.

Mr. Breithaupt: From what I understand would it be actually amended to allow that?

Mr. Bell: Or whatever. That is all that is being asked here. I think we should have some discussion about the type of consideration that should take place, whether it should be done by another adjudicator or another arbitrator, appointed and agreed to by the parties. Why can the ministry not just go and consider it on the merits?

Mr. Khoorshed: We have considered it on the merits and we came to the conclusion--what possible advantage could we have in not paying this man?

Mr. Bell: When do you say you did consider it on the merits? What did you consider?

Mr. Khoorshed: If you notice the adjudicator's report, he strictly adheres to his legal consideration of the merits of the claim. He does not once mention the settlement in his adjudication report. I do not want to reiterate that, but that is exactly our position as well.

Mr. Bell: But you just told me that is wrong. That opinion says that in general terms the minister does not have the authority to make a payment of interest under the act.

Mr. Khoorshed: Then I did not clarify myself. What I said was that as far as the minister's right to pay interest is concerned, by all means he has such a right. My contention is that under these circumstances when they were rental claims and interest was to be paid on it, we expressed the opinion and the adjudicator agreed with us that the minister should not pay the claim, legally. That was his interpretation. I do not want to go into that because it is a debatable issue. What I did say later was that as far as this particular claim was concerned, I do not think interest should have been paid because it was settled. It is as simple as that.

Mr. Bell: I am sorry. If we go to the second last page of this adjudicator's decision, he does not say: "On this case, I do not think you should pay." The way I read the second paragraph starting, "I therefore feel...." Are you with me? It is two thirds of the way down the page.

Mr. Khoorshed: Page 6?

Mr. Bell: Page 5. The paragraph starting, "I therefore feel...." It is a four-line paragraph. Are you with me?

Mr. Khoorshed: Yes, sir.

Mr. Bell: This is his conclusion: "...not only is interest not payable in this particular case, but any payment of interest would be ultra vires the minister's authority, since he can only do what he is authorized to do. Thus, I would recommend that no interest be paid."

Just a minute. He is not deciding this on its merits; he is deciding that there is a principle of law that prevents the minister from making a payment of interest under this act.

Mr. Khoorshed: Yes.

Mr. Bell: Is that the minister's position?

Mr. Khoorshed: Yes.

Mr. Bell: How could you have said to me then about three minutes ago that you accept in general terms that the minister does have the authority to make a payment under this act given the appropriate circumstances?

Mr. Khoorshed: No, Mr. Bell, what I said was this. I answered your question in reference to your query as to whether the minister has the right to pay interest on claims.

Mr. Bell: Under this act.

Mr. Khoorshed: No.

Mr. Bell: Oh, I am sorry.

Mr. Khoorshed: If it is even under this particular act, it depends upon the circumstances. If it is a valid claim, the

minister has the discretion to pay anything. Our contention here was that the claim itself, in the opinion of the minister, was not payable. We took the position that once that determination was made by the minister, he was in effect functus officio.

After a request from the Ombudsman, as a special grace, the minister opened up the case and made the payment. Therefore, the adjudicator was asked the question, in this particular case: "Should interest be payable from a legal point of view?" and the adjudicator decided, "No, it should not be."

Your question, sir, dealt with normal payment of interest in other claims--maybe under the act, maybe under other circumstances --and I was not referring to that.

Mr. Bell: I was, and I do not think anybody is going to be confused reading the record. Under this act, does the minister have the authority in the appropriate circumstances to make a payment of interest?

Mr. Khoorshed: In subsection 2 of the Public Works Creditors Payment Act, the minister has the authority to make almost any payment under any circumstances.

Mr. Bell: Does that include interest?

Mr. Khoorshed: That includes anything.

Mr. Bell: Does that include interest?

Mr. Khoorshed: Positively.

Mr. Bell: I have no further questions.

Mr. Chairman: Are there any questions up to this point? Mr. Zacks or Dr. Hill, do you want--

Mr. Zacks: Could I just make a few remarks? I will try to keep them short. As you can tell from the materials, this case has gone through three Ministers of the Environment and two Ombudsmen.

The issue, as both Mr. Morand and Dr. Hill saw it, was a relatively simple one. Some 10 years ago, a supplier of rental construction equipment went into a contract with a contractor working for the ministry. The contractor went under. The renter asked for some money from the government under the legislation. Money was denied him for almost nine years. The ministry had the use of that money.

The contractor came to the Ombudsman, after going through a hearing. Mr. Morand was extremely grateful that the minister undertook it, even though the minister did not accept the conclusions and waffled a bit on the recommendations. We were extremely pleased that things seemed to have been resolved at that point. The contractor always had the intention and desire to make his claim for interest.

3:30 p.m.

After he did not get the interest at the hearing, he then came to the Ombudsman and said to Mr. Morand: "I have a new complaint. I think they should have listened to me on interest. Will you investigate it?" Mr. Morand did and concluded that interest was payable under the legislation.

Mr. Morand and Dr. Hill wanted to make the same kind of recommendation. He did not want to treat this contractor any differently from the way any other contractor had been treated. He did not want to look at the merits of it. He just wanted to look at the procedures and say: "Interest is payable under the legislation, the appropriate case. Please look at it and address your mind to it." That is what Dr. Hill is asking as well.

Mr. MacQuarrie: When you say interest is payable--

Mr. Zacks: The appropriate case.

Mr. MacQuarrie: --or the minister has the right to pay interest, they are two different things.

Mr. Zacks: We are saying interest is payable. More so, if it is payable, the minister does not have this thing called absolute unfettered discretion. He has to treat the citizens fairly. That is what it comes down to. I have nothing further.

Mr. MacQuarrie: The adjudicator found the contrary.

Mr. Zacks: I know, and we said it was wrong.

Mr. MacQuarrie: Frankly, I am still left in rather a puzzled state of mind by the letter dated May 20, 1980, from the solicitors acting for the claimant to the ministry, which enclosed the draft release: "Please advise if you want any changes made thereto. I shall look forward to the receipt of the ministry's cheque in settlement of this claim, pursuant to the decision of adjudicator...." It indicated that upon receipt of the cheque, an executed release to complete the matter would be forwarded.

To my mind, that is strong indication, notwithstanding the inadmissibility of certain letters and the rest of it, that as with Mr. Khoorshed's statements today, this matter was settled. People left the adjudicator's hearing thinking the matter was settled.

Mr. Zacks: That is not the case. That is not our position. History shows that not to be the case.

Mr. MacQuarrie: Because a guy goes out and changes his mind, then fires his lawyers or whatever--

Mr. Zacks: He did not fire his lawyers.

Mr. MacQuarrie: Why did the lawyer write this letter?

Mr. Zacks: All I can do is speculate, but the final document that was sent was the final release accepted by all

parties, and it excluded costs and interests. The ministry signed it and the complainant signed it. He got his \$27,000. He said: "I am entitled to more. I am entitled to the interest on the amount you have kept for eight or nine years in your pocket. It should have been in my pocket in 1973." That is the complainant's position.

Mr. Breithaupt: You are telling us at that point that, at least from the execution of that release, the ministry apparently was prepared to allow the claim to be advanced, whether or not it would be successful.

Mr. Zacks: That is right. It signed the release without prejudice to its interests.

Mr. Breithaupt: Do we have a copy of that release?

Mr. Chairman: No, not in our books. It is just referred to in the documents. Mr. Bell, did you have an additional point?

Mr. Bell: Mr. Zacks, I am speaking personally now. From Mr. Khoorshed's comments, it would appear that in general terms one part of the recommendation has already been implemented; i.e., an acceptance in principle, given the appropriate circumstances, that interest may be payable under this act.

Mr. Zacks: I think that is what he said.

Mr. Bell: There is no doubt in my mind that the record shows and everybody in this room understands that to be the case.

Mr. Zacks: That is right.

Mr. Bell: Having implemented one half of it, the committee only has to consider the second half; i.e., to go back and consider it on the merits.

Mr. Zacks: That is right.

Mr. Bell: From what you heard today, are you and Dr. Hill still content that the minister did not want to consider the matter on the merits?

Mr. Zacks: Yes, I think we are. If the minister was going to undertake that, we are satisfied he would do it fairly and in good faith.

Mr. Bell: That is all, Mr. Chairman.

Mr. Chairman: Mr. Khoorshed, have you any concluding remarks?

Mr. Khoorshed: Nothing else.

Mr. Chairman: Dr. Hill?

Dr. Hill: I have a brief recapitulation. I took over this contentious matter after I became Ombudsman, as you are well

aware, and reviewed it. My staff informed me that the contractor had been out of pocket on his principal from 1973 to 1981. He simply wants the interest on the money he believes was owing to him, on the money he should have received in 1973.

I believe that fairness in this case is important. In my view, the fairer thing to do is to resolve the issue of the waiver in favour of the complainant. I believe the minister should accept and consider the claim for interest.

Mr. Chairman: Is there anything else? Can we leave it at this point?

Mr. Khoorshed: I would like to put one thing on the record, sir. We are not here as complainants at all of the Ombudsman's office. We have the utmost regard and we thank them for the assistance and help they give us all the time. As a matter of fact, they gave us good guidance. We are here because you asked us to be here. I would like to make that very clear.

Mr. Chairman: Thank you. We are going to adjourn the public portion of the meeting at this time. We will break for about five minutes and then we will go in camera to deliberate.

Mr. Breithaupt: Mr. Chairman, before you adjourn perhaps you might allow me a moment to have the unfortunate duty to advise the committee that Mrs. Iris Eakins, the wife of our colleague John Eakins, died today. She had been ill for some time, except of course her passing came as a most unfortunate shock and surprise to all of us who knew her well. I presume that you or the clerk of the committee would wish to write our colleague to inform him of the condolences of the members of the committee for this unfortunate event.

Mr. Chairman: Thank you for making us aware of that. I know that many of us got to know Mrs. Eakins quite well during the Vancouver trip. It is certainly sad news. I will be most pleased to do that on behalf of the committee.

Mr. Mitchell: That is unanimous, Mr. Chairman.

Mr. Chairman: The public portion of the meeting is adjourned.

The committee continued in camera at 3.37 p.m.

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Government
Publications

SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
TUESDAY, SEPTEMBER 18, 1984
Morning sitting



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From the Ontario Northland Transportation Commission:

Drury, N., Director, Human Resources
Dyment, P. A., General Manager

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Tuesday, September 18, 1984

The committee met at 10:37 a.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: We will come to order. We have some new faces at the front table, gentlemen from the Ontario Northland Transportation Commission. Will you identify yourselves for the record, please?

Mr. Dymont: I am Mr. P. A. Dymont, general manager of Ontario Northland. This is Neil Drury, who is our director of human resources.

Mr. Chairman: Dr. Hill, would you like to identify your new addition?

Dr. Hill: Yes, this is Paula Boothby. She is an investigator with our office.

Mr. Chairman: As you know, initially this morning we are going to be dealing with the Ontario Northland Transportation Commission, summary 4. I will ask Mr. Bell to lead us into it.

Mr. Bell: Mr. Chairman, at the beginning of this section, the members will see a detailed summary of similar type to the ones you have looked at on previous occasions. There is another page coming.

The Ontario Northland Transportation Commission last week delivered to me further comments respecting its position. They have been incorporated by the Ombudsman's office, but not yet distributed. While the copies are coming, I think we can proceed with pages 1 and 2 of the original draft. If we run into difficulty we can distribute the actual letter I received from Mr. Dymont.

You have reviewed the summaries. You can see the issue is whether the individual in question should be entitled to receive further benefits in consequence of his early retirement from the ONTC.

Dr. Hill, with that introduction could you begin and tell the committee members what this is about?

Dr. Hill: Mr. Chairman, Mr. Bell and members of the select committee, in case 4 my criticism is directed against certain terms of the Ontario Northland Transportation Commission's pension plan.

I believe this had an unfair effect on the complainant,

depriving him of a very small monthly pension. I am critical in particular because the commission was in the position some years back of taking over a private company.

The complainant was a long-standing employee of that company, with more than 30 years of service. I feel the commission should have made arrangements, which it could have done at no cost to itself, to give some recognition to the complainant's long service.

By not doing so, its pension plan has gained and been able to profit by the employer contributions made on behalf of the complainant. All that was required was a wider definition of the word "service" to include the complainant's company service. The employer contributions would then have vested in the complainant, making him eligible for a pension. I am not questioning the calculation of his pension. I realize it would have been less than \$100 a month--I think \$95 to be exact--because it would have to be calculated on the contributions he and his employer made to the plan.

I am simply saying the commission should not have allowed the complainant's lengthy service to be ignored. Although it gave him generous sick leave when he became ill and offered him another position, the commission should not have permitted its pension plan to benefit in view of his 37 years of service.

The complainant died this year and his widow has advised us she is in straitened financial circumstances. I think the commission should itself pay her as if she were entitled to survivor benefits under the plan. We are in agreement with the commission on the facts of this case. Our arguments on where the equity lies, however, differ. This is the matter for your deliberation.

Mr. Chairman: Mrs. Boothby, do you care to expand on those remarks?

Mrs. Boothby: Yes, thank you, Mr. Chairman. I would like to outline very quickly the facts and in that way come to the pith of the matter. I think it is probably easier that way.

The complainant was a captain of a ferry boat that operated between Manitoulin Island and the Bruce Peninsula. He spent his entire career working for the same company, starting in 1941 and working until early 1979, a total of 37 years. In 1973, after he had given 32 years' service to the company, the company was acquired by the Ontario Northland Transportation Commission. Some time later the complainant developed Huntington's disease and had to have his inner ear removed. He was not able to work during the whole of 1978, and early in 1979 he was obliged to retire. He retired because of his ill health.

Ontario Northland was very generous in providing him sick leave. His entitlement was six months; it gave him 10, the entire operating season. It also offered him a less responsible position. He was captain and they offered him the position of first mate. He could not take this, his widow has told me, because after the

surgery for the inner ear removal he developed an infection and his doctors advised him that he must never stand in the wind, must not expose himself to the wind. Therefore, he retired because of his health problems. His health deteriorated rapidly and he died this year at the age of 61.

Our concern is in the pension arrangements that were made for him. There were two separate sources of pension for the complainant. One was under a retirement policy set up by the original company. This was set up for management staff and it was a sort of golden-handshake deal, a lump sum payment on retirement, and a very simple and straightforward system.

The second source was the Ontario Northland pension plan and this was the more regular type of plan, a contributory plan to which the employer and employee contribute in equal amounts. Regarding the first source, the retirement policy, when it took over the company in 1973, the commission gave the management staff affected by it a commitment that it would honour the retirement policy. This it did in the complainant's case. It did so quite properly, and it paid him \$24,318.

The real point of contention has arisen under Ontario Northland's own pension plan. The plan is governed by regulations made by the commission with the approval of the Lieutenant Governor. It is a contributory plan. Employer and employee contribute equal amounts into the fund. The fund is managed by the commission, but the fund itself does not form part of the commission's assets. Administration is performed by a fairly appointed pension board.

The Ontario Northland Transportation Commission took over the company in 1973. Two years later, management staff were given the opportunity to begin contributing to the pension plan. The complainant made his contributions from June 1975 until his retirement in 1979. Ontario Northland paid in matching amounts, which are the employer contributions. They each contributed a sum of about \$5,600. With the interest, it came up to \$6,000. The amount he was paid was at four per cent interest, but the actual money that went in over that period for each of them was \$5,620.87.

At the date of his retirement, the complainant was refunded his own contributions plus four per cent interest. That is the figure of \$6,004.

The employer contributions stayed in the fund. The only reason the complainant was not refunded those and given those in some other way was that his service was deemed to be insufficient, and yet he had served the same company a total of 37 years.

This arose because the plan has an eligibility feature in its regulations. Only service with Ontario Northland is counted. The complainant had to satisfy an 85 factor. He had to total his age, 55, with the years of service to come to 85 and that would have entitled him to a very small pension. He did not satisfy it because his years of service were not long enough.

We are not quarrelling, as the Ombudsman has said, with the

amount of pension, only with his eligibility to it. The Ombudsman felt the definition of "service" in the Ontario Northland pension plan regulations is inequitable. It has the unfair result of cutting off the complainant and benefiting the plan by the amount of the employer contributions.

We felt there were two main indications that this was an oversight. One is that the plan provides for employees who come in when they are too old ever to qualify for a pension. The plan specifically provides that those people can contribute and when they retire, they will be given back double their contributions, their own contributions and the employer contributions. That was one analogous situation that was catered for by the plan, not this situation where the complainant retired because of ill health.

We felt the other indication that it was an oversight is a provision that is contained in the Pension Benefits Act. The Pension Benefits Act regulates all pension plans registered in the province. The act has a section in it, section 29, that says that when one company takes over another, the employees being taken over should have their earlier service deemed as being continuous. It is a deeming section.

To us, this seemed to apply completely to this situation. Ontario Northland had taken over the company and the complainant's service should be deemed to be continuous. However, because of what we think is a technicality, the section could not apply because the company's retirement policy was a lump sum deal. It did not arrange for periodic payments. It did not qualify as a pension plan, so the section does not apply. Legally it does not apply, but we felt there was no reason why it should not apply for equitable reasons.

10:50 a.m.

This inequity is not what we think should have happened. At the time Ontario Northland took over the company and provided for people like the complainant to start contributing to the Ontario Northland plan, it should have considered things like his long term of service. He had served 32 years by that time, and the ONTC should have provided recognition for that to make him eligible so that the employer contributions could vest in him, either to come back to him or to be paid to him in the form of a pension, which is what he wanted.

It is for that reason the Ombudsman concluded that this omission or oversight was unreasonable.

Mr. Chairman: Before we ask Mr. Dymont to comment, I have a list of members of the committee who I assume would like to direct questions to the Ombudsman or his staff at this point.

Mr. MacQuarrie: Looking at this situation and hearing your outline of it, it would appear we have two different forms of retirement allowance coming into play here. First, there is the one followed by the original employer of a lump sum settlement on retirement and, second, there is the pension scheme in force at the Ontario Northland Transportation Commission.

I have a question dealing with the lump sum payment. If he had continued in his employment with his original employer, there would be no question of any pension benefits. It would be the lump sum payment, possibly in an increased amount. Is that correct?

Ms. Boothby: That is correct. It would not have been an increased amount if he had still become ill when he did and had retired at the age of 57 when he did, but that is correct.

Mr. MacQuarrie: You mentioned that if the ONTC had recognized his service at least to the extent of allowing a pension to vest, he would be getting something like \$95 a month. How much would the \$24,000 buy at his date of retirement by way of annuity, as a guaranteed term annuity, a fixed income one, possibly with survivor benefits?

Mrs. Boothby: We have not made that calculation. The complainant has died, leaving a widow. If he had had an entitlement, she would have received 50 per cent of his--

Mr. MacQuarrie: What I am trying to get at in my mind is whether the \$24,000 lump sum payment would buy him a pension equivalent to what he would otherwise have received had his service been recognized by ONTC and his pension vested.

Mr. Breithaupt: If that money was simply put in the bank, he would have had \$240 a month at the practical interest rates at the time.

Ms. Bohnen: I think it is important to point out that the entitlement of employees of his general type was not either/or. It is not a situation where you get either the retirement lump sum or, if you qualify, a pension under the pension fund.

Mrs. Boothby: We felt there were two separate entitlements. There is the entitlement under the retirement policy, which, when the commission took the company over, it gave a commitment it would satisfy, and a separate deal altogether to which employee and employer contributed.

Mr. MacQuarrie: Would an employee who had enough pensionable service with the ONTC and who had served with this company before, be entitled to both?

Mrs. Boothby: I think anybody with the identical employment record would not be entitled to--I am sorry; I think I misunderstood your question.

Mr. MacQuarrie: We will assume that this employee had enough pensionable service with the ONTC to obtain a vested pension. Would he be entitled, in addition to that vested pension, to the lump sum payment that his former employer had given to management?

Mrs. Boothby: Yes. On the information we collected on the file, that is how we saw it, that he would be entitled to receive both, because ONTC had given a commitment to honour the

retirement policy. The separate benefits were building up under its own pension plan. That was how we looked at it, as two separate benefits.

Mr. MacQuarrie: You mentioned earlier about the unfairness of this situation, pointing out the act should not be so strictly applied in this instance. My first line of questioning deals with the lump sum settlement and what sort of pension benefit it would buy, assuming he had been employed with Ontario Northland Commission for a sufficient time. It strikes me on the face of it there has not been that much inequity in the situation.

Mrs. Boothby: Another way of looking at it is that during the time he was contributing to the Ontario Northland plan his employer, Ontario Northland, was paying this matching amount of pension contribution. The general theory these days is that that is a part of a salary remuneration for employment. It is lost. It has not gone to the complainant. It is in the plan.

Mr. MacQuarrie: There are two ways of looking at it, the employer's point of view and the employee's point of view.

Mrs. Boothby: The employer will not benefit from it. It is in the plan.

Mr. MacQuarrie: That is all to the benefit of the other employees.

Mr. Breithaupt: As a supplementary question, that is the same situation as faces a member of the Legislature who serves one term and where the pension plan vests after five years. If the person does not have five years of service, he gets his contributions back with an interest payment, and there is no employer Legislature contribution that comes back--

Mrs. Boothby: We feel in these circumstances, in view of the ill-health factor, there was a good case for those employer contributions vesting.

I looked at three other public sector pension plans. The municipal plan, in the circumstance of illness, pays a pension when the employee has to retire because of ill health. The public service plan pays back double contributions when the employee retires because of ill health. The teachers' superannuation fund does exactly the same as Ontario Northland.

We felt that because the complainant was retiring on account of ill health, there should have been some provision for that, just as there is in the plan when somebody is too old to qualify for a pension. He gets back his double contributions.

Mr. Breithaupt: Under our program, we certainly do not get back double contributions if we are not successful in obtaining re-election.

Mr. MacQuarrie: On another line of questioning, when this employee developed Huntington's chorea, it was my understanding from reading the Ombudsman's report that the

employer had agreed to provide him with a less onerous position, one that recognized his diminished capacities and his handicap.

You indicated his physician had advised him not to return to work because of the removal of his inner ear. He could not stand in the wind. I do not know whether the new position that was offered to him would keep him out of the wind. I do not know whether he could wear a cap to keep the wind out of his ears. It struck me from reading the report that the employer had bent over backwards to give this man employment to allow sufficient time for a pension to vest. Am I right in that?

11 a.m.

Mrs. Boothby: There is absolutely no doubt the commission was very humane, generous and understanding when he became ill. His wife has told me the reason he could not accept the position of first mate was that an infection had developed and presumably "first mate" means standing out in the wind. I do not know.

We are not quarrelling with that. The commission took a very humane approach. We are still left with the problem of those employer contributions sitting in the pension plan.

Mr. MacQuarrie: Right.

Mr. Lane: Part of my question has been answered. I would like to wait until I hear the other side of the story for the other part.

Mr. Van Horne: I am having trouble with the 85 factor. He was 56. He had 37 years' service. In 1979 the complainant retired suffering from Huntington's disease which prevented him from working any longer. He was 56 at the time. He had worked for the company for 37 years, five of which were with the commission. You have 93; if you subtract those five years, you are back to 88. That still leaves him beyond the 85 factor.

Mr. Breithaupt: Those years do not count. Those years are matched by the plan that paid him three quarters of his salary. It is just the last five years that count.

Mr. Van Horne: That is what I am trying to figure. My colleague is aiding and abetting the cause. That is why I am having trouble. How big a factor was this in trying to resolve the issue, that is, the mechanics of the years of service plus the age of the complainant? Is that a point of disagreement between you and these others?

Mrs. Boothby: I do not think so. He was 56 years of age and the commission said he had five years of commission service. Obviously, 56 and five are well short of the 85 factor. If the commission had included the 37 or 32 he would easily have satisfied it.

Mr. Van Horne: Let us go back to the point of takeover. What understanding did the employees at the point of takeover have

from what was known as the company to the commission? This guy had worked for the company. Now the commission takes over. The employees have to have an understanding of what the new boss has in mind for them as employees. What is the new contract? What does the new boss say? Did he have any verbal understanding? You talked about a gold handshake. I want to know if there was any written contractual thing.

Mrs. Boothby: I did ask for this several times from Mr. Dyment's predecessor. I may be wrong here, but I understand it was a verbal undertaking that Ontario Northland would satisfy or would honour the retirement policy of the company it was taking over. I never saw anything in writing. It may now exist.

Mr. Breithaupt: You do not know whether that policy was in effect the lump sum payment of three quarters, which was their obligation and would be acknowledged by the long-term employees as what they would receive for the previous service. Perhaps we will be able to hear from the commission on what that relationship was to bring.

Mrs. Boothby: The retirement policy itself is in writing and it is simple. It is a one-page document that says with 20 years service or more, payment is equal to the final year's earnings.

Mr. Breithaupt: Payment is equal to three quarters of the final year's earnings.

Mr. Van Horne: Was that the retirement policy of the commission or the company?

Mrs. Boothby: The retirement policy of the company is a one-page document in writing. As far as I know, the actual commitment given to employees was not set out in writing. I understand that was verbal.

Mr. Van Horne: When the commission took over.

Mrs. Boothby: Yes.

Mr. Van Horne: Perhaps when we get to the other witnesses they can clarify that. I am still in a fog but hope when we get to these gentlemen we will be able to resolve it.

Mr. Breithaupt: We will get you standing out on deck.

Mr. Bell: Mrs. Boothby, could we talk about some numbers, dollars, this relates to? First, the benefits are commensurate with the nature, extent and length of contributions in the commission's pension plan. Is that correct?

Mrs. Boothby: That is correct.

Mr. Bell: You are not asking in the recommendation that this man be gifted anything more than he would otherwise have received had his contributions been joined with the commission's contributions and some payment. Had he been entitled to

participate on the date of his retirement with the benefit of both side's contributions, that would have translated to \$95 a month.

Mrs. Boothby: Yes. That is correct.

Mr. Bell: He was given half of it. Is that right?

Mrs. Boothby: Yes. He was given his own contributions back plus four per cent interest, a total of \$6,000.

Mr. Bell: If the committee wants to deal with the dollar implications of this, does it divide the \$95 a month by two, thereby giving credit for the \$6,000 he did receive?

Mrs. Boothby: In our recommendation we proposed a rather complicated system of settlement. We suggested a calculation be made assuming how much pension would have been paid to the complainant through until his death and to set off against that, the \$6,000 of contributions, and then to start paying the pension thereafter.

Mr. Bell: Is the net amount then the \$95?

Mrs. Boothby: If anything is to be paid now, it would be half that amount because there is a widow.

Mr. Bell: No. Let us not complicate it by that yet. On your scheme, if he had been entitled to participate on the date of retirement, how much would he have received monthly?

Mrs. Boothby: About \$95.

Mr. Bell: You are absolutely sure of that.

Mrs. Boothby: Yes, according to our calculation, but--

Mr. Bell: He got \$6,000 paid to him, so you are going to give a credit.

Mrs. Boothby: Yes.

Ms. Bohnen: If you look on page 2 of the synopsis, we will be able to follow it easily.

Mr. Bell: That is where I am, and that is where I am not able--

Ms. Bohnen: What you do is figure out the arrears of pension on the rate of \$95 a month; subtract from those arrears the \$6,000 which he received as a refund of his contributions with interest.

Mr. Bell: Do that for us. What is it?

Mrs. Boothby: I worked out that if we had done that his pension would have started at some point in this year, about April or May.

Mr. Bell: No, no. How much is the lump sum with giving the credit?

Ms. Bohnen: Excuse me for a minute.

Interjection.

Ms. Bohnen: It may be that the Ontario Northland Transportation Commission has more precise calculations. When we calculated it, it would have taken until early this year to wipe out the \$6,000.

Mr. Bell: I see the way you did it. You did it the other way.

Mrs. Boothby: Yes.

Mr. Bell: You are right. It is a complicated calculation.

Mrs. Boothby: I have the calculation here.

Mr. Bell: From March 1984 to death, which was when?

Mrs. Boothby: May of this year, May 24.

Mr. Bell: So we have three times \$95 plus half of that for the life expectancy of the widow--

Mrs. Boothby: Yes.

Mr. Bell: What age is she?

Mrs. Boothby: I have the calculation.

11:10 a.m.

Ms. Bohnen: She is 58.

Mr. Bell: All right. Let us not bog down in numbers. If you capitalize the amount you believe she is entitled to, having regard to her life expectancy, does it equate to \$10,000?

Mrs. Boothby: I do not know the answer to that; I am not an actuary.

Mr. Bell: All right.

Mrs. Boothby: It is \$47.50 a month and she is about 58 years of age now. That is 20 years to go.

Mr. Bell: That is \$650 a year, for the sake of argument. She would have to live to 87 to get it to \$10,000. Is that right? All right.

Mrs. Boothby, in the material there is reference to a gratuitous payment by the commission of six months' sick leave credits amounting to approximately \$12,000. It was information that passed between the offices in the course of the

investigation, and therefore presumably the Ombudsman was or ought to have been aware of it. To what extent did the Ombudsman consider that payment before formulating his conclusions and recommendations?

Mrs. Boothby: He certainly did consider it. He certainly acknowledged--and I think we have said this right the way through--that Ontario Northland was very generous to the complainant when he became ill with regard to sick leave and in taking a higher rate of pay to calculate the sum paid to him under the retirement policy; but we still felt we could look at the pension plan problem in isolation.

Mr. Bell: Notwithstanding that \$12,000 gift, you still wanted him to receive additional moneys by way of equivalent pension benefits. Is that correct?

Mrs. Boothby: Yes.

Mr. Bell: I am not sure whether you made this clear. Do we know as a fact that the \$24,000 figure is the exact figure he would have received had he stayed with his former employer?

Mrs. Boothby: Yes. I have the retirement policy, and it is set out quite clearly that if he retires under the age of 65 and he has given 20 years of service or more, he gets a payment equal to three quarters of his total monthly earnings.

Mr. Chairman: Mr. Dymont, may we hear Ontario Northland's position on this matter?

Mr. Dymont: Our side of the coin is essentially the same as you have heard. This man was with the company for a period of time. It was taken over by Ontario Northland in 1973. There was a scheme in effect, which has been outlined, whereby nonunion employees of that company, while they were employed with the company, were entitled to a benefit when they retired of a full year's salary or, if they retired before that, three quarters.

When Ontario Northland--in our recent history, at least--takes over a company, we take over the assets and the liabilities of any plan they may have, and in the case of the Owen Sound company we took over that obligation. We also allowed the people in the company to join our pension plan. Our pension plan is predicated on people's being Ontario Northland employees, and the amount of pension is contingent on the amount of time a person spends with Ontario Northland.

We continued the former Owen Sound plan in order to fill the gap. A person has to be with Ontario Northland for a minimum of 10 years and has to have this factor of 85 that has been referred to, so in order to bridge the gap we continued the commitment, which was in writing, to the company employees.

This man became ill. He was with the Ontario Northland plan for an insufficient amount of time to qualify for a pension. When he became ill we also extended to him all the Ontario Northland fringe benefits, to which he had not formerly been entitled. This

included six months' sick leave. He had the six months' sick leave, which amounted to \$18,000. We extended the sick leave by another four months and gave him a further \$12,000, for a total of \$30,000 in sick benefits.

Mr. Chairman: You say he was not entitled to that?

Mr. Dymont: Not under the company plan.

Mr. Chairman: The initial \$18,000?

Mr. Dymont: No. We started the clock running on that when he joined Ontario Northland.

We paid him \$30,000 for being sick and then, recognizing that this man could not qualify for an Ontario Northland pension, we offered him employment in a lesser capacity. We could not keep him as a captain, in the light of our responsibilities to the public. We offered him a job as first mate. He would have dropped from about \$2,900 a month salary to about \$2,200, but it was still a decent living. He declined this offer. This factor of wind in the ears is a new one to me.

Mr. Chairman: Did he give you any reasons at the time?

Mr. Dymont: No. We just assumed he did not want to continue employment. If he was unable to work, we did not know or we would not have offered him employment. At any rate, he retired in accordance with the regulations of our plan, which is a contributory plan and represents our employees' money. We paid him his contribution of \$6,000 because the commitment had been made to company employees to bridge the gap between their retirement undertaking and our pension plan.

We paid him the \$24,000 to which he was entitled by that written policy. If there is any doubt as to whether that policy was extended to employees, the cashing of the cheque would indicate that we followed through on the policy. So he got that \$24,000. Also at the time, by virtue of another benefit plan, we waived the premium on insurance on his life. I understand that \$48,000 policy has now been paid to his widow as a result of the insurance we carried.

Mr. Chairman: What did that amount to?

Mr. Dymont: It was \$48,000.

Mr. Chairman: But when you talk about premiums?

Mr. Dymont: I do not know; whatever life insurance costs are for a 57-year-old man to the extent of \$48,000.

Mr. MacQuarrie: Did he pay the premiums, or did the company waive the premiums?

Mr. Dymont: The company waived the premiums.

Mr. MacQuarrie: Under disability?

Mr. Dymont: Yes.

Mr. Bell: Was he entitled to that in any event, regardless of the years of service with ONTC?

Mr. Dymont: Yes, but only when he joined Ontario Northland as a result of us starting the clock running on all these benefits.

It has been mentioned that the Pensions Benefit Act says Ontario Northland should undertake the pension liabilities and obligations of a company it takes over from. We did. It has also been mentioned that the Pensions Benefit Act does not apply, and we agree that it does not apply. None the less, we undertook the responsibilities the company formerly had.

Mr. MacQuarrie: (Inaudible) pensions called for is only when there is a pension plan in effect.

Mr. Dymont: When we took over the transportation company, we took over the pension plan that was in effect at that time. We think we have been more than reasonable. The obligations the company had to this man were paid. Our pension regulations were followed. We extended the sick leave to the extent of \$12,000 more than that to which our policy commits itself. We think we have been more than reasonable.

To provide another pension in addition to what has been paid is gilding the lily. An Ontario Northland employee, after 37 years, would be paid a pension; he would not get the lump sum. We do not think this man should have the best of both worlds. It is our view that the man was treated reasonably.

Mr. Lane: Mr. Dymont has cleared up a number of things that have been bothering me.

When you took over Owen Sound Transportation Co. Ltd., did you take over all the employees?

Mr. Dymont: Yes.

Mr. Lane: Will they all get the same treatment? Whatever pension was coming to them from the old company is still there, plus whatever they earn with your company?

Mr. Dymont: For the non-union employees, that is true. The unionized employees, of course, are now roughly compatible with the Seafarers' International Union and the Marine Officers' Union pension plans. The unions have negotiated a pension plan separately for the unionized employees.

The non-union employees are still under this commitment, that they will receive our pension plan or their pension plan, whichever is better. But I think the majority of employees will have, either now or very soon, the minimum required to qualify for our pension.

11:20 a.m.

Mr. Lane: I take it that extra four months was gratuitous. The sick leave was all used up and you gave him an extra four months to ponder this offer you had made him, whether he would take the lesser position or not?

Mr. Dymment: Right.

Mr. Lane: Did you pay him during that period of time?

Mr. Dymment: Right.

Mr. Lane: To your knowledge, was he able to work? It was just a case of not being able to do his normal duties as a captain.

Mr. Dymment: To the best of our knowledge. The wind factor is something new to us.

Mr. Lane: You said that if he had not gone to the Ontario Northland Transportation Commission, he would not have received the life insurance. That was your life insurance.

Mr. Dymment: Right.

Mr. Lane: So he got into the system and then that premium was paid by the company because if you are ill you do not have to pay the premium.

Mr. Dymment: Right.

Mr. Lane: Since the present employees with ONTC started to work, have they been paying their share of their pension all the way along?

Mr. Dymment: Right.

Mr. Lane: So if you had done what if being suggested here, you would have been a little unfair to the long-term employees of your own company, would you not?

Mr. Dymment: In my view.

Mr. Lane: In my view too. It seems you would be doubling on the one you took in and taking something from other employees on a long-term basis.

Mr. Dymment: Right.

Mr. MacQuarrie: Was there any right in your insurance or in the pension scheme for a person to buy back recognized service?

Mr. Dymment: No. We do not have that provision.

Mr. Lane: Was all this in writing to employees of Owen Sound Transportation Co. Ltd.? Was this deal in writing and not just something you talked about? Did they know what it was?

Mr. Dymment: The Ontario Northland pension plan is definitely in writing.

Mr. Lane: Thank you very much.

Mr. Sheppard: Just to follow that up, Mr. Chairman. When you took over Owen Sound Transportation Co. Ltd., did you make any provisions that this man could go on your pension and be paid back so that if something like this happened, he would get a half-decent pension?

Mr. Dymont: No. When we took over the Owen Sound company we said: "You do not have a pension plan as such, you have a retirement benefit, so we will continue it. You can start contributing to our plan. We will start the clock running on our plan." It is as if we took over any person at that age. We would start the clock running on our plan.

Mr. Sheppard: Did you offer that he could pay back so that he could get into your pension plan if he worked for five years or more?

Mr. Dymont: Our regulations disallow any buy-back.

Mr. Sheppard: Was there any discussion about this when you took over Owen Sound Transportation Co. Ltd.?

Mr. Dymont: No, there was not. There has been lots of discussion about buy-back in our plan and it has been denied every time.

Mr. Sheppard: Do you think it will be brought up again in the future?

Mr. Dymont: I understand the Ombudsman is bringing it up, so I would expect to have discussion.

Mr. Chairman: Mrs. Boothby, you heard Mr. Dymont mention that today is the first time he has heard about the ear problem and that the individual could not work in the wind. When did you first hear of this? Has there been any confirmation with medical opinion? Is there any way you can confirm that indeed this was the case?

Ms. Boothby: No medical confirmation. I just heard it from his widow. She gave me the names of two doctors he saw in Toronto. She said he could not accept the position as first mate on his doctor's instructions.

Mr. Chairman: Did you not think this was relevant initially when you got involved in this matter, though, the fact that the commission had offered an alternative employment? You got involved in this and you said you just learned about this condition from his widow. Did you not consider this to be a relevant point?

Ms. Boothby: No, I did not, mainly because when the complainant first came to us, he was completely incapacitated; he was finished. His widow did the complaining for him. We always understood that he simply could not carry on working because he was too ill.

From her descriptions of his disease, he had to have somebody in attendance all the time. He had to be dressed and fed and everything. It sounded as if he could not have accepted any position. I made that assumption. I may be wrong. Maybe there was a period when he could have taken some other job. She now tells me that he could not actually take the first mate's position because of the infection after his inner ear surgery.

Mr. Chairman: Mr. Bell asked you about the sick leave benefit. I think he made reference to \$12,000 or something in that neighbourhood. Mr. Dymment mentioned there was also an additional \$18,000 that this individual was not qualified for, for a total of \$30,000. Did you take into consideration that total dollar figure?

Mrs. Boothby: Yes. We weighed it up. He was ill for the whole of 1978, and he could not work; yet his salary was paid to him. He was entitled to six months of that sick leave, but they gave the four months to him. All that time pension contributions were being made into the plan by the Ontario Northland Transportation Commission and by the employee, the complainant.

We have never denied that they were humane, generous and kind to him while he was sick. We were looking at the pension plan, what had been paid into it, what would have happened if he had been in another plan and what would have happened if they did not have this service eligibility requirement. It is as simple as that.

Mr. Bell: I take it that it would not have made any difference if they had paid him a cheque for \$100,000 when he walked out the door; you would still be of the same position today. Is that correct?

Mrs. Boothby: No.

Mr. Bell: Are you dealing in principle or are you dealing from the facts of this case?

Mrs. Boothby: If they had given it to him in compensation and said, "Our plan is not satisfactory and it is unfortunate that you do not get your employer contributions back in some way; here is compensation," obviously we would have been delighted.

Mr. Bell: In the labour field, which is something you are experienced in, we talk about a total compensation package.

Mrs. Boothby: Yes.

Mr. Bell: This man arguably, and I think undeniably, benefited in his total compensation package by \$30,000 more than he was entitled to. The question then becomes, when is fair fair? Why do you say an additional \$10,000 is required?

Mrs. Boothby: A public servant in the same circumstances today might go with severance pay, with double his contributions and with all sorts of other benefits that are better than what our complainant received. It sounds good, but I think what we could not overlook was the fact that the employer contributions are in

the plan and they remain to the benefit of the plan. Incidentally, and I have made this point before, they do not benefit the commission in any way; it is out of their reach.

Mr. Bell: So that we understand, I take it that there is an amount of money the commission could have paid him on a gratuitous basis upon retirement that you would have considered to be reasonable compensation, notwithstanding your conclusions about the perceived inequity in the pension scheme. Is that correct?

Mrs. Boothby: That is correct.

Mr. Van Horne: Can I ask--

Mr. Chairman: No. Mr. Lane wanted to follow up with a supplementary.

Mr. Lane: Last week we were dealing with compensation claims, and we were arguing what various doctors said or did not say in their reports. If this had been an injury rather than a sickness, you would have depended entirely on what the doctor said about his disability. You are finding out that he was ill and could not work, but you did not get a doctor's report. Why not?

Mrs. Boothby: I just accepted that.

Mr. Lane: You would not have accepted the witness's word if it was a compensation claim, would you?

Mrs. Boothby: This sounds like a sort of backoff, but I do not deal in that area. I had been in touch with his wife continuously throughout this matter. She was giving me the details of it. We do not check every tiny little thing that complainants tell us. It certainly sounded as if it was genuine.

Mr. Lane: I am not trying to be hard on you. It is just that I want to know, if it had been an injury rather than an illness, you would have been dealing with doctors' reports and what they said and not what the witness said?

Mrs. Boothby: Yes.

Ms. Bohnen: From the beginning and throughout, the focus of this investigation was the terms of the pension plan and the unfairness we saw it work on this man in these circumstances. None of the Ombudsman's conclusions depended in any way on the man's health. That was the backdrop for it, but it was never disputed by the commission that he was forced to retire because of ill health.

Mr. Lane: Would it not seem fair that when the employer gives four months extra to consider the job, as I understand it, and pays him for those four months, the employer would be entitled to know he was not able to take it; that it was not a case of not wanting to but that he was not able to? Somebody should have been sending in a report to somebody saying, "Unfortunately, he cannot take that job." Should it not have been the people who were investigating it?

Ms. Bohnen: I do not know. But from our point of view, however it might have affected the commission's other dealings with this man and his family, it did not really have anything to do with his pension entitlement.

Mrs. Boothby: I have here the letter the complainant wrote to the commission at the time of his retirement, and he ended it in this way: "I hope my work record will speak for my dedication to the ship and crew and only regret that my health has failed to this degree as to terminate my employment at this early age." I think it is clear; I do not think anybody disputed that he was so ill he could not work.

Mr. Lane: You are right. I think he was a very devoted employee, and I think he had good employers, because in my mind they treated him as if they had great respect for him. It just seems to me that maybe we are ruling with the heart and not with the head here.

Mr. Van Horne: Our counsel used a phrase such as "the \$30,000 to which he was not entitled." That puzzles me a little bit. There has been reference to three different amounts of money: \$12,000, \$18,000 and \$30,000, which I assume is the grand total. He had an unused block of sick leave time, and that accounts for \$18,000. Is that half a year's salary?

Mr. Dymont: When he joined Ontario Northland in 1973, we extended to him a sick leave benefit that entitled him to six months' pay; that amounted to \$18,000. We extended it another four months for \$12,000.

Mr. Van Horne: But you would have done that for any employee. That was the Northland plan.

Mr. Dymont: The first six months.

Mr. Van Horne: Right. How do you cover the additional four?

Mr. Dymont: How do we cover it?

Mr. Van Horne: Yes. It must have some kind of fund. Where do you get the money?

Mr. Dymont: Out of revenue. It is an operating expense to us.

Mr. Van Horne: So this \$12,000 gift is basically the four months you paid salary to him for his not being able to work?

Mr. Dymont: That is right. He did not want to work; he was ill. It has been mentioned that no one disputes that he was too ill to work. "No one" includes me, and I dispute it. I think he was able to go to work or we would not have offered him a job. There was dialogue with the man during those four months, lots of it, and in the judgement of our people, he could have performed as a first mate.

Mr. Van Horne: They actually sat and talked with him, looked at him and said that, in their view, physically this guy was able to go to work; and yet he is now dead.

Mr. Dymont: Right. At what point he became unable to work I cannot comment, but he was able at the point when they were discussing with him the extension to his sick leave and offering him a job. We have a responsibility to the public and we were not going to put on that ship a man who could not perform.

Mr. Van Horne: You made reference just in passing to waiving insurance premiums for a policy that brought \$48,000 to the widow. Was this an exception to your policy? Have you generally done that in similar cases? Have you ever had to do that before; that is, waive the premiums?

Mr. Dymont: Yes, it is accepted practice.

Mr. Van Horne: You have.

Mr. MacQuarrie: The disability waiver of premium would be built into the policy.

Mr. Van Horne: The point is it is not benevolence to this particular individual; it was a format or a policy you have followed in the past.

Mr. Dymont: They all result from Ontario Northland's takeover of this company. They are benefits to which he would not have been entitled.

Mr. Van Horne: But in fact the \$48,000 came--I am not trying to belittle your efforts, but it could be the view of some committee members that you have been generous all the way through and, in fact, the generosity is not directed at this person because of him particularly, but rather is a result of your policies.

Mr. Dymont: The four-month extension was simply a management decision, not policy.

Mr. Van Horne: That plus the offering of this other job would be two outstanding examples of benevolence on your part, the company policy part? Would anybody else have received the same treatment?

Mr. Dymont: Right. Whether it is benevolence or not, I do not know, but they were certainly deviations from our policy.

Mr. Van Horne: Just those two factors?

Mr. Dymont: Right.

Mr. MacQuarrie: I am trying to sort the thing out in my mind. Getting back for a minute to the Ombudsman's recommendation of a pension of \$95 a month starting this year some time, would it also then be the Ombudsman's position that the same result could have been accomplished if, at the time his contributions to the

pension plan were paid to him, the employer's share was also paid, the \$6,000?

Mrs. Boothby: That certainly would have been one solution. That is what the public service does.

Mr. MacQuarrie: We have both the employer and employee contributions, \$12,000, \$6,000 of which he got. Offsetting that, we hear evidence of ex gratia payments having been made through extended sick leave that add up to \$12,000. I do not know whether the company had a long-term disability insurance plan for management staff.

Mr. Dymont: Not at that time.

Mr. MacQuarrie: You say he should have got \$6,000 extra at the time of retirement. The company says, first, its plan does not permit that and, second, he already got these additional benefits on an ex gratia basis. It puzzles me why the Ombudsman is taking the position he is.

Mrs. Boothby: Let us go back to the beginning again. We felt it was unfair and unreasonable that written into that plan in the circumstances was a definition of "service" that was so narrow as to ignore the complainant's earlier 32 years of service, the circumstances being the takeover situation. This is precisely the situation that provision in the Pension Benefits Act covers.

Mr. MacQuarrie: As I understand it, the former employer, the company, had a pension plan and that pension plan would have been taken over by Ontario Northland.

Mrs. Boothby: It came very close to that.

Mr. MacQuarrie: Instead, that company had a different retirement policy, namely a lump sum payment on retirement, which was honoured.

Mrs. Boothby: Yes.

Mr. MacQuarrie: Which is more fair?

Mrs. Boothby: There are many people who go through life building up separate pension entitlements from separate plans. It is not out of the way that one entitlement had built up under the retirement policy, about which, in Mr. Dymont's own words, Ontario Northland said: "We will continue it. We will honour that. We will pay out under that." Then a separate entitlement begins to build up as a result of contributions, but those contributions are barred to the complainant because his earlier service in the same company is ignored. It is the eligibility provision we felt was unreasonable.

Mr. MacQuarrie: Changing the employer as opposed to employment?

Mrs. Boothby: Yes.

11:40 a.m.

Mr. Chairman: His earlier service was not in essence ignored because if Ontario Northland had not taken over control of that company, we can assume the same problems would have befallen the gentleman and he would have been saddled, if you will, with simply the lump sum payment and not the other benefits that accrued as a result of Ontario Northland coming into the picture.

Mrs. Boothby: True, but it was not a windfall benefit. It was a benefit to which he had contributed.

Mr. Chairman: You were just saying there was no recognition of his service. Obviously there was recognition in the form of that lump sum.

Mrs. Boothby: Yes.

Mr. MacQuarrie: In your opinion, was he not far better off in the circumstances by Ontario Northland having taken over the company?

Ms. Bohnen: Mr. MacQuarrie, I do not think that is a fair question to put to Mrs. Boothby. What really matters here is the Ombudsman's opinion, not her opinion.

Mr. MacQuarrie: I will ask the Ombudsman then.

Ms. Bohnen: That is fair enough. Mrs. Boothby would not know if she would be permitted to express an opinion like that during the course of her investigative work.

Mr. MacQuarrie: I am sorry. I will direct the question to the Ombudsman.

Dr. Hill: I accept my counsel's position on that.

Mr. Bell: There is a man missing from this discussion.

Mr. MacQuarrie: Pardon me?

Mr. Bell: There is somebody missing from this discussion.

Ms. Bohnen: I think it is important to remember that the pension entitlement we are talking about is not a gratuity. It is a pay-as-you-go pension plan. It is not another ex gratia payment that Ontario Northland is being asked to make.

I do not think we could agree with one answer given to Mr. Lane's question, that to give what is being requested here for this individual would work some hardship to other members of the plan. Everyone pays into the plan and everyone receives back, upon retirement, a pension calculated on the basis of their contributions and the employer contributions.

Mr. MacQuarrie: So long as the pension vests.

Ms. Bohnen: So long as the pension vests, but I

understood Mr. Lane's earlier question to be, if this person got his pension, would that reduce the pension entitlement of the other members of the plan?

Mr. Lane: That was not the question.

Ms. Bohnen: Okay. I am sorry then.

Mr. Lane: It was a question of them having paid in 10 more years than he had for the same returns he was about to get, sort of thing. My question was satisfactorily answered.

Ms. Bohnen: But I am not sure it was correctly answered, that is my problem, Mr. Lane. I do not think what happens to him has any bearing at all on the other members of the plan. That is all.

Mr. Chairman: Mrs. Boothby, I only say this because you made some reference to it earlier about the desperate straits of the widow--

Mrs. Boothby: Yes.

Mr. Chairman: How do you reconcile that with what Mr. Dymont said about the insurance policy payment?

Mrs. Boothby: I am afraid I do not know the details of the insurance policy and if she has benefited from that. She simply told me that her present position is very bad. It is possible that it is not payable yet. I do not know.

Mr. Chairman: Mr. Dymont, maybe you could clarify that.

Mr. Dymont: You will be happy to know that the papers relative to the insurance--

Mr. Bell: Does she have the money yet?

Mr. Drury: No. It is a matter between the insurance company and her. We have resolved--

Mr. Bell: When did he die?

Mrs. Boothby: He died on May 24 of this year.

Mr. Dymont: We can turn the papers over and you can check with the lady or the insurance company.

Mr. Chairman: No, I do not think it is necessary. Are there any additional questions from members of the committee at this point?

Mr. Bell: Mr. Dymont, assume for the moment that this man had served his five years before he retired, would that fact have made any difference in your treatment of him with respect to the additional sick leave credits and the offer of another position?

Mr. Dymont: I do not recognize the significance of five years.

Mr. Bell: No, I do not think you understand my question. Can we assume for the moment that he was entitled to full participation out of the pension plan before he retired? Assume that fact. Would that fact have made any difference to the commission in its treatment of this man in respect of the additional sick leave credits that you extended to him and the offer of alternate employment for a period of time?

Mr. Dymont: Probably.

Mr. Bell: In what way?

Mr. Dymont: We would probably take into account the pension to which he would become entitled.

Mr. Bell: We are speaking with that wonderful thing called hindsight right now, I guess, are we?

Mr. Dymont: And hypothesis.

Mr. Chairman: Mr. Dymont, have you any comments you would like to make in summing up your position?

Mr. Dymont: I have concern that it may be portrayed that ONTC's taking over this company has worsened this man's position. I submit that had this man stayed with the Owen Sound transportation company and had Ontario Northland not become involved, he would have got \$24,000.

In my view, he has benefited immeasurably by Ontario Northland taking over the Owen Sound company. I assure the committee that we adhere to the intent of the Pension Benefits Act. Had a pension plan been in effect, we would have taken it over. We think we acted reasonably.

Mr. Chairman: Have you some comments, Dr. Hill?

Dr. Hill: Before I make a comment, Mrs. Boothby wants to say a word.

Mrs. Boothby: There is one test you can apply here. Let us take two employees, one who worked, as our complainant did, for 37 years with a company that was taken over by Ontario Northland and then becomes ill at the age of 56, and another employee who works for Ontario Northland for the same period, becomes sick at the same period but, let us say for the purpose of argument, his first 32 years with the commission are on probation and he has no right to contribute to the pension plan.

They both come in together, start contributing to the pension plan together and resign at the same time. The Ontario Northland probationary employee has his pension vested; our complainant does not, because his earlier service with the company is not recognized.

Mr. Bell: However, the Ontario Northland employee gets \$2,000 less than your man. He would not get four months' sick leave credits gifted to him.

Ms. Bohnen: We do not know that.

Mrs. Boothby: I do not see why not.

Mr. Bell: If we are talking hypothetically--

Mrs. Boothby: If you take absolutely identical circumstances--to put it another way, if our complainant had been with Ontario Northland but had not started contributing to the plan until 1975, his pension would have vested.

Mr. Bell: Do you expect the commission would have paid either of those gentlemen, in that circumstance, sick leave credits on a gratuitous basis?

Mrs. Boothby: I think they would have said to themselves that after 37 years they could afford to be generous.

Mr. Bell: I agree.

Mr. Chairman: Mr. Dymont, do you want to respond to that before I ask Dr. Hill--

Mr. Dymont: I was only wondering about that man. Where had he been hiding for 32 years without paying into the plan?

Mrs. Boothby: He would have had to be on probation.

Dr. Hill: You have heard both sides of the argument. It is not disputed that Ontario Northland Transportation Commission treated the complainant with great humanity when he retired due to ill health. However, I believe the equities weigh in favour of him and his widow receiving the benefit of all the contributions paid into the pension plan.

I think the payment of a pension would fairly recognize this individual's more than 30 years' service with the company. That is all I have to say.

Mr. Chairman: Mr. Dymont and Mr. Drury, we appreciate your attendance here today. We may be able to deliberate this case now. Do we have the Ministry of Municipal Affairs and Housing officials here?

Mr. Bell: They are not coming until this afternoon.

Mr. Chairman: Then I suggest to the members of the committee that we move in camera and deliberate this case.

Ms. Bohnen: Are there any other previous cases on which the committee has deliberated and about which we could be apprised of the outcome?

Mr. Chairman: Yes. Go ahead, Mr. Bell.

11:50 a.m.

Mr. Bell: The committee deliberated yesterday afternoon on detailed summary recommendation denied number 10, and the committee, on motion, decided to support and accept in substance the recommendation of the Ombudsman. It will be so reporting in its next report.

While the language has not been settled, I think those who are interested can presume the committee will recommend something like this in its next report, "That the minister accept in principle that the crown may, in the appropriate circumstances, pay a claimant interest due, pursuant to a term of a contract with a contractor, and the minister consider the merits of the complainant's claim for interest owing on the principal amount in question and formulate a decision on whether to pay such claim."

Mr. Chairman: We are going to adjourn the public portion of the meeting at this point, and I suggest we come back around 2:15 p.m. Mr. Sheppard, do you want to say something before we go in camera?

Mr. Sheppard: The question I wanted to ask, Mr. Chairman, is about 32 years on probation. I have never heard tell of anybody being on probation for 32 years and I wanted to ask if that is common or were you just using that as an example?

Mrs. Boothby: I am sorry. I meant on contract. I think that might arise, being on contract.

Mr. Sheppard: Yes, there is a big difference between being on contract and on probation.

The committee continued in camera at 11:52 a.m.

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Government
Publications

OM-16

SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
TUESDAY, SEPTEMBER 18, 1984
Afternoon sitting



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Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations

Hill, Dr. D. G., Ombudsman

From the Ministry of Municipal Affairs and Housing:

Armstrong, R., Counsel; with Tory, Tory, DesLauriers and Binnington

Cornell, W., Deputy Minister

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Tuesday, September 18, 1984

The committee resumed at 2:07 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: Before we move into the next case, I would advise you, Dr. Hill, that in respect to the case we discussed this morning, summary 4, the committee deliberated after those discussions and indicated it will not be supporting your recommendation in that case.

Moving on to recommendation denied, Ministry of Municipal Affairs and Housing, summary 8, volume 2, I gather that because of some time problems the ministry officials are going to be speaking first in this instance.

Mr. Cornell, I know that most of us--at least, those of us who are 40--recognize you, but perhaps you could identify yourself and the other chap for the record.

Mr. Cornell: I am Ward Cornell, the Deputy Minister of Municipal Affairs and Housing. Really, I am just sitting in for the minister, who sends his apologies that he cannot be here. He would like to be here.

As you know, the whole Pickering matter is one of the longest-running areas of interest to the government. One of the other long-running matters is Vespra and he is attending a meeting this afternoon with the reeve of Vespra and other dignitaries.

This whole Pickering matter is an ongoing affair; I would like to think and hope that today we will see its resolution. I will call upon our counsel, Robert Armstrong, who has really been through the whole 12 years of it. He will read a statement on the ministry's behalf.

Mr. Armstrong: Mr. Chairman and members of the committee, as you are aware, complaint 8 that is before you arises out of the government's land acquisition program in North Pickering, as the deputy has mentioned. The gist of the complaint, as we understand it, is that the complainant was led to believe the price he would be paid for his property, either by voluntary sale or by the alternative of expropriation, was its market value as of March 2, 1972, and that this price was fixed. The complainant states that if he had known the price to be paid was not fixed and that if he had waited for expropriation he would have received a value based on the date of expropriation, he would not have sold his property when he did.

It is stated in the temporary Ombudsman's report on this complaint that in substance it is typical of the majority of the North Pickering complaints. The recommendation made in that report, therefore, is that this complaint be included in the revised settlement proposal concluded by the ministry and the Ombudsman.

It is the ministry's position that this complaint is not a typical North Pickering complaint and that the Ombudsman's recommendation is not warranted given the circumstances of this complaint, which we will now outline to you.

The complainant is a lawyer and a partner in a large and prestigious downtown Toronto law firm. He is recognized by the legal profession in this province as an expert in the field of expropriation and land compensation law. He has written a guide on Ontario expropriation law and practice, and more recently has co-authored a comprehensive manual on expropriation law and practice, including expropriation law and practice in Ontario. I can add in parenthesis that I suspect you would find those two reference books in almost any law library in the province, and certainly any law library of any major law firm.

It is inconceivable to the ministry that this complainant, expert as he is in expropriation law and practice, could possibly have been misled about his legal rights on expropriation. Indeed, correspondence from the ministry acquisition file dealing with the complainant's property reveals that the complainant was aware at the time he sold his property to the government that its value was not fixed at March 2, 1972 market value. In a letter written to the North Pickering project office, dated February 19, 1973, the complainant wrote--and here we quote from a letter written by him several days before he signed the offer:

"I also confirm the discussion with you concerning possible income tax liability. As you know, there is a capital gains tax from January 1, 1972, and I will require your estimate of the value of land at least on March 2, 1972 and your estimate of the increase in value to date of sale. From our discussion, I have concluded that you have built in a factor of approximately one per cent per month which for present purposes shows a total increase from March 2, 1972 to date of 12 per cent."

The complainant sold his property to the government pursuant to an offer executed by him on March 1, 1973. The correspondence I have quoted demonstrates the complainant was at that time aware the purchase price for his property was not fixed at March 2, 1972 market value, but had, in fact, been increased by a factor of one per cent per month.

This complaint was first made to the Office of the Ombudsman on March 1, 1978. Your committee will recall that the original Ombudsman's North Pickering report was released in July of 1976. The dispute regarding that report between Mr. Maloney, the first Ombudsman, and the late John Rhodes, then Minister of Housing, was extensively reported in the press. As a consequence of that

publicity, a large number of further complaints concerning North Pickering were filed with the Office of the Ombudsman during the summer and fall of 1976. Those new complaints were, with the concurrence of your committee, referred to the Ombudsman's hearings chaired by Mr. Hoilett, now Judge Hoilett.

Given the wide media coverage of the dispute over the original North Pickering report and of the Ombudsman's hearings and commission of inquiry subsequently constituted to resolve that dispute, the ministry submits that it is remarkable that this complainant should have waited so long to make his complaint. The ministry has repeatedly stated to the Ombudsman that if this complainant, who was a knowledgeable and sophisticated resident of North Pickering, had a valid complaint he would have made it long before he did.

This complaint was not heard by Mr. Hoilett because of an agreement made between the Ombudsman and the ministry that any North Pickering complaints made after mid-December of 1977 would be investigated in the normal course by the Ombudsman's office and would not be referred to the Hoilett hearings.

The ministry maintains that the revised settlement proposal made by it in response to Mr. Hoilett's report, which was accepted by the Ombudsman, was never intended to apply automatically to subsequent North Pickering complaints not included in it. The settlement proposal was formulated by the ministry to resolve in a fair and reasonable manner the North Pickering complaints that had been considered by Mr. Hoilett and by the Donnelly commission.

The ministry further submits that this complaint is analogous to the 18 complaints that were excluded from the ministry settlement proposal. You will recall that your committee agreed with the minister's submission at your September 1983 sittings that 18 knowledgeable and sophisticated land investors should not receive further compensation under the settlement proposal.

The ministry contends that the present complainant should be treated in the same manner. He was, and still is, a recognized expert in Ontario expropriation law and practice and was aware that land values were not fixed. His sale to the government must be considered to have been an informed decision made with full knowledge of the rights and remedies available to him if he were to wait for the alternative of expropriation.

In conclusion, the ministry submits that the stated grounds of complaint are refuted by fact and the special knowledge possessed by this complainant, and that therefore the recommendation of the temporary Ombudsman ought not to be upheld by your committee.

Mr. Chairman: Thank you, Mr. Armstrong. I am a little uncertain about when you have to depart.

Mr. Armstrong: I am fine, I am in your hands. I do not have to depart until I am finished. I have another counsel looking after my client's interests, so I am all right.

Mr. Bell: Unless they come and get you.

Mr. Armstrong: Unless they come and get me; which I told Mr. Bell is a possibility, given the nature of the case.

Mr. Chairman: Very good. Perhaps at this point, if any members of the committee have questions they would like to direct to Mr. Armstrong or Mr. Cornell they might do so before we hear from the Ombudsman.

Mr. Hodgson: Let us hear from the Ombudsman first.

Mr. Chairman: That has not been our policy. Mr. Bell, do you have anything at this point?

Mr. Bell: There are two issues in your statement and in the material committee members have which the ministry relies upon in support of its position not to implement the recommendation. One is the delay, the time factor. He was late in complaining and therefore ought not to be included in the Hoilett settlement formula, if we can call it that.

The second is on the merits. The man had some particular expertise that makes it improbable--and in fact you made that evident in quoting the letter--that he was not fully aware of all of the facts respecting market value.

The ministry has accepted item 7, which was a case similar to this where there was a late complainant. May we take it that the key issue for the committee to address is the second one, this gentleman's expertise?

Mr. Cornell: I think there was one other factor; it was put forward there was a possible mixup in terms of number 7. As often happens in our ministry when we talk about time deadlines, we always look at them a second time and sometimes a third time, and in that particular case we looked at it again and agreed with the Ombudsman we would accept it. So there was a difference between the two in terms of the handling of the request to be considered.

Mr. Armstrong: That is the point, Mr. Bell, and my understanding is that the Ombudsman said to the minister and Mr. Cornell, "We unfortunately made a mistake in respect of number 7." In our view number 7 was well within an acceptable timeframe and in before the Maloney-Rhodes cutoff date.

Mr. Bell: All right.

Mr. Armstrong: Am I right that it was before the Maloney-Rhodes cutoff date that had been agreed to between Mr. Crosbie, the then deputy minister, and Mr. Maloney? So that the ministry in good faith accepted there was a mixup in the Ombudsman's office and the complaint was timely and it was just a bureaucratic mixup, which we accepted.

2:20 p.m.

Dr. Hill: Mr. Chairman, this is the last case about North Pickering. I know that last year your committee considered 18 North Pickering complaints which the Minister of Municipal Affairs and Housing (Mr. Bennett) refused to settle with the Ombudsman. I also know that your committee refused to endorse the Ombudsman's recommendation in those cases. Some of you may be asking yourselves why I am here today presenting this case and I will try to tell you.

The minister believes this complainant, a lawyer who practises expropriation law, should not be paid additional compensation for his land because he was a knowledgeable, sophisticated person. I do not doubt that, but I believe everyone deserves equitable treatment from the government, whether he be wise or foolish, rich or poor.

As you will hear in more detail shortly from my counsel, I consider this complaint to be the same in principle as the 95 North Pickering complaints the minister and my predecessor agreed to settle. The 95 were not subjected to a means test as a precondition of payment, nor should this complainant be. On the facts, this case is the same as those that were settled. On the basis of the facts, I believe he merits additional compensation and that is why I am presenting the Ombudsman's recommendation to you today.

Ms. Bohnen: I think that for the committee to have a full appreciation of the Ombudsman's recommendation, it is necessary to outline some of the steps in the processing of this complaint and our dealings with the ministry, if you will bear with me for a few minutes.

It is quite true that this complainant, who I will refer to as Mr. C, did not make a complaint until March 1978. The original agreement between the minister and the Ombudsman providing for the handling of North Pickering complaints, an agreement in which this committee had something of a hand, provided that all complaints that had been made up to that point, as well as all subsequent complaints, would be heard by Keith Hoilett.

As you know, Mr. Hoilett found it necessary some time subsequent to the beginning of his hearings to impose a cutoff date for the hearing of complaints, and this complainant came in after that cutoff date. Part of the agreement that put in the cutoff date was that subsequent complaints would be investigated by the Ombudsman in the normal course, and presumably would be considered by the ministry in the normal course.

During the Hoilett hearings a decision had to be made as to what to do about Mr. C's complaint. A decision was made to hold it in abeyance because it would be futile, and probably impossible, to investigate it during the Hoilett hearings. The ministry was, of course, notified of our intent to investigate the complaint at some point.

Mr. Hoilett's report, which was completed some months after the conclusion of the hearings, led to settlement discussions between the Ombudsman and the ministry. It was hoped by us that this complaint, as well as another one or two in more or less the same category, would be settled in the course of those discussions. It was raised with the ministry at that time. However, as you know, when the settlement agreement was concluded, there was no resolution of this complaint.

We then had to consider again what we should do about Mr. C's complaint. We decided we would analyse his complaint to determine whether it was the same as or similar to the other cases that had been settled. Once we decided that it was, we had to consider whether there was any good reason not to include the case in the settlement agreement, the overriding principle being that like land owners ought to be treated with equity.

We did not conduct the kind of investigation that would have had us retrace exactly the same territory that had been exhaustively charted by Keith Hoilett. What we did was analyse Mr. C's complaint to determine whether it was the same as the 95 cases settled under the agreement.

We noted that Mr. C had argued essentially that government publications, conversations with government officials and media reports led him to believe the price he would be paid, whether he sold voluntarily or waited for expropriation, would be fixed as at March 2, 1972.

It is important to refer to Keith Hoilett's findings on this point. He said in his report, which was quoted in the Ombudsman's report:

"The early decision of project officials to establish market values as of March 1 or 2, 1972, had the obvious merit of uniformity and, having regard to the early expectations as to the timing of expropriation and the immediately antecedent market conditions, may even have been a reasonable decision."

This is the important part:

"It had the effect, however, of effectively freezing market values or creating the impression of frozen market values, a perception that was fostered by the acts and omissions of the project and its officials."

I appreciate that the ministry does not accept Mr. Hoilett's findings on this point, but the Ombudsman did.

Mr. C also argued that if he had known that if he waited for expropriation he would receive market value as of that date, he would not have sold when he did. Mr. Armstrong read to you a portion of a letter from Mr. C which appears to indicate that Mr. C had knowledge that there was an update factor of one per cent a month built into the price being offered to him.

I suggest that Mr. C's acknowledgement or knowledge of that was no different from any other land owner who received different

offers from the ministry over a period of time in which the price escalated, but Mr. Hoilett also made a critical finding on this. Dealing with the update policy of one per cent a month, which he found was a project policy, he said of the project:

"The project's policy of steadfastly adhering to that policy, with the passage of time, became increasingly more suspect. The policy was manifestly ad hoc and arbitrary. While the project may not have been able, with slide-rule precision, to quantify the increases that were taking place in the real estate market, based on its market surveys, among other things, it was armed with a fund of market information that placed it in a position much superior to the individual land owners with whom it was dealing."

Mr. Morand also recorded in his report, dealing with the settlement agreement and the land owners who were excluded from it, that the ministry conceded that project staff were unable to update sufficiently project appraisals for many of the properties because of the unprecedented volatility of the real estate market.

Since Mr. C's complaint was essentially the same as the other North Pickering complaints, to us equity demanded that he be treated in the same way as the 95 complainants covered by the agreement.

The agreement calls for land prices to be updated from the date of the government appraisal on which the ministry's offer was based to the date of the agreement of purchase and sale. This is done arithmetically by reference to market data and an average escalation factor of four per cent a month.

The purpose of the agreement is to ensure that the owner gets fair market value as at the date he sold, not fair market value that existed on the date his property was appraised some months earlier. That is the only result we seek for Mr. C: an update from March 2, 1972, the date of his appraisal, to March 1973, when he agreed to sell his property.

As we have heard, the ministry's main reasons for rejecting the Ombudsman's recommendation are that Mr. C complained too late and that he was such a knowledgeable vendor it is inconceivable he was misled or at a disadvantage in bargaining with the ministry.

We simply cannot accept that his delay disproved the merits of his complaint. We have not heard from the ministry that it was taken by surprise by the complaint or that it was prejudiced in any way by the delay in presentation of it.

The complainant's explanation for the timing of making his complaint was that until a number of expropriation hearings on other sales had been heard, he did not realize the extent to which he had been dealt with inequitably by the ministry.

With respect to Mr. C's knowledge, you have already heard from Dr. Hill, but I think it is important to point out that the agreement and the formula contained in it take into account any bargain that any vendor was able to negotiate for himself through his expertise, his experience or his skill.

After a corrected price is calculated under the agreement, the actual price paid is subtracted and the vendor just gets the difference. That means we are not talking about giving Mr. C double recovery or anything extra. All we are talking about is giving him an updated price at fair market value as at the date he sold in accordance with the formulae the ministry felt fairly dealt with all the other 95 North Pickering complainants.

That is my presentation. I can answer any questions.

2:30 p.m.

Mr. Chairman: I have one of my own. In the detailed summary you made reference, I guess to rule out the possibility of speculation, to the fact that his property was residential and was not held for speculation. But in his statement, Mr. Armstrong made reference to the capital gains tax, a possible income tax liability. How does that tie in with a residential property?

Ms. Bohnen: First of all, the issue of speculation and the labelling of people as speculators, I am sure you recall, arose last year in connection with how the 18 should be characterized. Perhaps unfortunately, at some stage this office used the word "speculator" to describe all the others. I think it is clear from the record that none of them was a residential owner and that they held land for investment purposes. I think they were almost exclusively corporate holdings.

In Mr. C's case, to my knowledge, it is exclusively a residential holding, but from my hazy recollection of income tax law, I think the size of his property--52 acres or something like that--might indeed have created capital gains tax problems for him.

Mr. Chairman: So he was a resident.

Ms. Bohnen: He was and remains a North Pickering resident.

Mr. Chairman: But he was the resident of this particular property we are talking about?

Ms. Bohnen: Yes, he was.

Mr. Lane: Mr. Chairman, I appreciate what Mr. Armstrong said in his presentation here. He is a very learned person and would have known the situation. However, I also appreciate what Dr. Hill said, that everybody should be treated fairly, rich or poor, big or small.

I think the big argument here is the date of the complaint, the fact that it was late, that it was after the cutoff date. Governments have to work on dates; everything works on dates. If I do not file my income tax by a certain date, I am fined. If I buy a new car today and pay \$700 in sales tax, and if the Treasurer grants a holiday on sales tax tomorrow, I cannot go and get my \$700 back.

Everything has to work on dates. Just a year or two ago I had some farmers who were getting a subsidy on their cattle; they

were late filing and they did not get the subsidy because the date had passed. I do not think we can ignore the fact that we have to operate on dates.

Ms. Bohnen: Mr. Lane, if I may speak to that for a moment, the cutoff date we are talking about was purely a date for Keith Hoilett to hear complaints; it was not a date for the Ombudsman to investigate North Pickering complaints. It was always contemplated that late North Pickering complaints would be investigated and reported on and that findings would be made to which the ministry would then have to respond in some fashion.

Mr. Hodgson: Mr. Chairman, this question is to the ministry. When Mr. C accepted the final offer of \$263,600, had the property been appraised by the ministry before it made this offer?

Mr. Cornell: To the best of my knowledge, yes.

Mr. Hodgson: The same question goes to the Ombudsman. Did the Ombudsman's office ever have an appraiser go in there and appraise the property?

Ms. Bohnen: No, we did not.

Mr. Hodgson: So you do not know whether this was an overpayment, an underpayment or what.

Ms. Bohnen: All I know is that if you apply in this case the formula contained in the settlement agreement, which we worked out to figure out the increase in value from the date of appraisal to the date of sale, then you get an increment in value, including interest, of some \$80,000. But no, we certainly did not conduct an appraisal.

Mr. Hodgson: If that property were appraised today, what do you think the value would be? It was a pretty hot property at that time; there was supposed to be development there, but that has all gone by the board. What do you think that would be? Would it be less than \$263,000?

Ms. Bohnen: I have no idea.

Mr. Hodgson: I think that has to be considered in the case too.

Mr. Cooke: Why is it relevant?

Mr. Hodgson: Pardon?

Mr. Cooke: I do not understand why that would be relevant anyway.

Mr. Hodgson: As far as I am concerned, this property owner heard of other complaints that had been successful in getting extra money. Some time later, he thinks, "Well, it is a good chance for me to grab a few extra bucks," and he puts his complaint in then and it came in late.

Ms. Bohnen: Mr. Hodgson, if that is so, and it may be so, if you look at the facts and the dollars, using the formula, the man still appears to us to be entitled to more money.

Mr. Hodgson: That is why you are here: you think he is.

Ms. Bohnen: Yes.

Mr. Chairman: Perhaps we could direct that question to Mr. Cornell. Taking a look at the arithmetic and the compensation that was awarded to the other individuals in this situation, how do you respond to what Ms. Bohnen just said?

Mr. Cornell: Their whole case is predicated on the fact that they should look at Mr. C in terms of the 95, and we maintain that this should be looked at and considered in the same way as the 18. The time factor is still very important, and it was in late. We did take another look at it, and in view of all the circumstances, as we did in all the cases, we felt it should be grouped with the 18.

I cannot personally comment, because I do not know enough about the specifics of the formula. I would ask my staff if you would like me to.

Mr. Chairman: The point was made earlier that people are broadly defined as speculators, the other 18 about whom we are talking, were they not?

Ms. Bohnen: They were, yes.

Mr. Chairman: I thought they were. That was my understanding of it. We are trying to fit this individual into that category as well. Is that what you are suggesting?

Mr. Armstrong: In my submission to this committee, I find it easier to fit Mr. C into that kind of category. The ministry's position a year ago, which was accepted by this committee, was that the 18 people who were classified as speculators were knowledgeable people, would know about the market, would know about their rights, would know that the market may or may not have fluctuated, and that you could not in all good conscience, according to the ministry, take public funds and compensate those people because they would have had those very factors in mind.

The minister came to the conclusion, and presumably so did this committee, that they were in the position that they ought to have known what the situation was.

In this case we say here is a distinguished lawyer--if there can be such a designation for a lawyer, or at least an experienced lawyer--with a major downtown firm who specializes in this very field. We say he ought to have known, just as the speculators knew, that the price was fluctuating and that land values were not frozen. But, of course, quite apart from his being in the position that he ought to have known, we do not ask you to simply draw that inference; we provide you and the Ombudsman with his own words

which make it very clear that he knew. The whole basis of his complaint being that land values were frozen and that if he had known that land values were not frozen, he would not have sold to the government just goes straight out the window.

2:40 p.m.

The view of the ministry is that there is a lack of credibility therefore to the basis of his complaint. The lack of credibility is supported, and we agree with Mr. Lane, in that he sits on his so-called rights, as it were, from the summer of 1976 until the spring of 1978 and does nothing. He lives out there.

One can assume, from who he is, that he knew what was going on and what was going on in this committee in the summer of 1976, as Mr. Bell will so clearly remember, I am sure, as will Mr. Hodgson. It was on the front page of the Toronto newspapers off and on for a period of six weeks. So one could hardly say that Mr. C did not know the result of the hearings before this committee and that he had a right to make a complaint and get in to the Hoilett hearings. For whatever reason, he chose not to do so.

Then he comes along, after that whole deadline has passed, and slips in a complaint, as it were, at that stage. He could have put his complaint in well before 1978, gone to the Hoilett hearings, subjected himself to cross-examination and examination-in-chief and said, "Even though I am an experienced lawyer in this field, I did not know that land values were frozen." He chose not to do that; he chose to make his complaint now.

I say, with respect, to the members of this committee on behalf of the ministry, that it would be unconscionable to expend public funds of something in the order of \$80,000 in those circumstances.

Mr. Chairman: Do any committee members have questions at this point? Ms. Bohnen, did you want to say something?

Ms. Bohnen: I would just like to respond to that. Among the important points is the fact that this man was not in the business of dealing with land and investing in land. He was indeed an experienced expropriation counsel, and we grant his knowledge of the Expropriations Act. We do not particularly grant that he would have any better knowledge than any other North Pickering resident of what was happening to the real estate market there. As did any other of the 95 compensated land owners, he received more than one offer for his land. He could be presumed to know that there was some room to bargain with the ministry. Nevertheless, on hearing all of these other cases, Keith Hoilett and Donald Morand made the findings that I read to you.

But quite apart from all of this, whatever the man's state of mind and why he complained when he did, the numbers hold. The ministry and the Ombudsman agreed on an arithmetic formula to determine when the facts, as they existed, called for additional compensation to be paid to give someone fair market value as of the day he sold. If you apply those formulae to this man, you get

a figure. I do not understand that those formulae are not equally valid in application to him, regardless of any state of mind he had at the time.

Mr. Cooke: That is the same argument we used for the 18 who did not get compensated. Is not that right?

Ms. Bohnen: That is right.

Mr. Lane: I was wondering how you would relate to his own statement in a letter of February 19, 1973, when he is asking for information regarding capital gains. He admits there that he knows the whole story.

Ms. Bohnen: First of all, it is only a partial story. We know, because of the Hoilett hearings and the report, that the one per cent was a grossly inadequate update figure. What is really more to the point is that he did an arithmetic calculation, as any other land owner could have done, when he got more than one offer from the ministry: he subtracted the difference between the two offers and averaged it out. But in that respect, as I said, he is no different from any of the other 95.

Mr. Lane: Except that he put it in writing.

Ms. Bohnen: Yes.

Mr. Cooke: If I were to feel comfortable supporting the Ombudsman's position, I would have to be convinced that this individual is different from the 18 who this committee decided were not going to be compensated. At this point, I would like you to try to convince me more than you have.

Ms. Bohnen: It is difficult for me to understand the committee's reasoning in this regard. I certainly was not present during your deliberations, but having been present during the presentation of the case, I think from where we sat, what underlay the consideration was that these were corporate land owners holding large tracts of land for investment purposes. Most of them were relatively new in the North Pickering area. They were intimately familiar with the real estate business, fluctuations of price and so on. Those characteristics do not apply to Mr. C. He was a residential owner; this was his home. He is no different from any of the other 95, many of whom were professional people. I cannot recall whether any of the others were lawyers, but certainly at least one other who was compensated was a professor of constitutional law. Mr. Bell may recall who he was.

Mr. Bell: Mr. V?

Mr. Breithaupt: Mr. L.

Ms. Bohnen: Mr. L.

Mr. Bell: That was real estate law.

Ms. Bohnen: Among the others who were compensated were knowledgeable, sophisticated people. What it came down to from

where we sat was, "The objective data give you a figure or the objective data do not give you a figure." If in your own mind you can put people who are in the business of trading in land in a different category, then you cannot put this man in that category. He is not someone who was or is in the business of trading in land.

Mr. Chairman: I still think we should hear the other side of that, too. How does the ministry feel he does fit in with that? I am still not clear. Ms. Bohnen mentioned the other individuals being corporate land owners, owning large tracts of land, and this chap apparently did not fall into that definition.

Mr. Armstrong: That is generally so, Mr. Chairman. Some of the 18 were lawyers and developers, but in so far as we see the case from Mr. C's point of view, we are dealing, as Ms. Bohnen pointed out, with a man holding 50 acres. There is more to it than just his one-acre or two-acre homestead or his own residence. As Mr. Cornell pointed out, on that basis alone he is making an inquiry about the application of capital gains tax and the income tax because presumably he was concerned about the tax on the speculative portion of the land he held.

Leaving that aside, as I said earlier simply to emphasize it, although he is not four square within the same category as the other land speculators, the reason the ministry took the position that the speculators ought to be excluded was not that they were speculators. It was because they were knowledgeable people and would have known what their rights were and would have known land values were not frozen, so you could not say a speculator has a valid complaint when he thought land values were frozen because you knew that he would not. I believe this committee accepted the position.

Thus we come to the same conclusion in respect of Mr. C, that not only is he in a position that he ought to have known, based on his learning and experience in the field, that land values were not frozen, he is also demonstrating in his own letter to know that they were not frozen. His own complaint is put forward on that basis.

He says, "Look, if I knew land values were not frozen, I would have waited for expropriation." That is what he is saying. He is in effect saying he was misled. We say, with respect, he was not misled and once you demonstrate he was not misled then his complaint goes. We say on that basis his complaint goes and he is not only like the speculators who were in a position to know, he is demonstrated not only to be in a position to know but did know that they were not frozen.

I do not think I can put it any better than that, but if there are any questions I will attempt to answer them.

Mr. MacQuarrie: Mr. Chairman, my curiosity with respect to the size of holdings and the reason for concern over the capital gains involved has been satisfied, but I would like to find out whether any preliminary steps with respect to expropriation were taken on this property.

Mr. Armstrong: I do not believe so because he sold in 1973 and expropriation was as of February 4, 1974. That is my recollection. I see Mr. Bell is nodding.

Mr. MacQuarrie: There were no moves to expropriate as such?

Mr. Armstrong: No.

2:50 p.m.

Mr. MacQuarrie: Then the agreement of purchase and sale that closed in March 1973 was an agreement that was voluntarily entered into by him, the price being agreeable and all the rest.

Mr. Armstrong: Yes. It is dated March 1, 1973. It probably closed later than March 1, 1973.

Mr. MacQuarrie: The price was fixed at that time. I was a little concerned about some of his contentions, as stated in the Ombudsman's notice of intention to investigate, that "publications from the government, reports in the media and conversations with officials of the government clearly indicated that the price he would be paid for his land, either by voluntary negotiated sale to the province or by the only alternative of expropriation, was the market value as it existed on March 2, 1972, and that this price was fixed." Then in subsequent correspondence he obviously knew that was not the case and was aware it was not the case.

Mr. Armstrong: Yes.

Ms. Bohnen: I have one small point. Mr. Chairman, you were concerned about the size of the tract of land, I believe, and the purpose for which it was held. I heard Mr. Armstrong use the difficult word "speculation." I do not believe there is any evidence that any part of Mr. C's land was held for nonresidential purposes. In North Pickering, being a rural area, many of the land owners had large tracts of land. Many of them were farms.

Mr. Breithaupt: So 50 acres was a reasonable parcel?

Mr. Armstrong: I think that is fair, just to interrupt. I do not think the ministry can make its case in respect of Mr. C on the basis that the 50 acres was held for speculation. I think that is a fair statement to make. In response to the chairman I did not intend to put it that way, although I guess that is the way it came out.

Mr. Chairman: Was the building on the property his principal residence?

Ms. Bohnen: Yes.

Mr. Mitchell: Why would he be paying capital gains on an expropriation that--

Ms. Bohnen: Mr. Armstrong may remember income tax law a lot better than I do, but I think it results from the size of the

tract. For income tax purposes it is your house and, I believe, two acres or something like that.

Mr. Mitchell: I would like to be sure of that. I would like someone to--

Ms. Bohnen: I am sorry; it is 10 acres. Your house and 10 acres can be sold without any capital gains consequences. The remainder is treated differently under income tax law, but it has nothing to do with the actual use that you put the lands to.

Interjection.

Ms. Bohnen: That is another problem.

Mr. Mitchell: My understanding is that capital gains did not apply to expropriation unless--and the rule then applies of strictly the house and 10 acres. I thought capital gains on an expropriation did not apply at all. I am not a tax specialist.

Ms. Bohnen: There are different rules, as I recall, for expropriation circumstances. Mr. C, of course, was not expropriated, so he would just fall back on the house and 10 acres.

Mr. Mitchell: You assure us that this was the principal residence?

Ms. Bohnen: I believe so. I would be happy to hear if the ministry disagrees with that.

Mr. Armstrong: We have no reason to believe other than what Ms. Bohnen has stated.

Mr. Chairman: Are there any other questions from the committee at this stage? Mr. Bell.

Mr. Bell: Mr. Armstrong and Mr. Cornell, in fairness, you may want to confer with your staff and comment on this shortly. If you look at the dates of complaint 7, i.e., the date he complained to the Ombudsman and the date the Ombudsman notified your office of his intention to investigate, from the material the committee has it appears that those dates are later than these dates.

Mr. Armstrong: I think that is right.

Mr. Mitchell: Since Mr. Bell has raised that question, on going through number 7 in relation to this particular one, I see correspondence relating to two individuals within the same letter, both Mr. A and Mr. C.

Mr. Bell: Yes, but you can disregard anything in those letters as they relate to the other gentleman, Mr. A.

Mr. Mitchell: Quite correct, except that both were parties to that correspondence.

Mr. Armstrong: We can put that to rest, Mr. Bell, about

Mr. A, number 7. Mr. Hall has been associated as counsel throughout as well on this thing, almost as long as you and I have been involved in this matter.

Mr. A had a discussion with an official of the Ombudsman's office in February 1977. He apparently was of the view that in his discussion with the member of the staff of the Ombudsman in February 1977 he was making a complaint. I understand that is what the Ombudsman's office said to the ministry and the ministry eventually said, "All right, if that is your position and you are saying because of some bureaucratic confusion, the complaint does not get dated until later, we will treat it as having been a timely complaint."

Mr. Bell: Okay, that is laid to rest. That clarifies the date. I wanted to give you an opportunity to comment.

Ms. Bohnen, can you clarify something for the committee? In the summary, you have quantified the recommendation on page 2 at \$81,117. Has an allowance been given for the increase in value attributed to this property from March 2, 1972, until the date it was sold in June 1973?

Ms. Bohnen: No. I believe not.

Mr. Bell: Surely a credit should be given.

Ms. Bohnen: You are asking me whether any credit has been given for an increase in value between the date of offer and the date of closing? Is that what you asked me?

Mr. Bell: The formula, as I understand it, is based upon a percentage applied per month, from the date of the appraisal, of which the land owner was given notice, to the date of the sale.

Ms. Bohnen: Yes.

Mr. Bell: You have quantified the adjustment amount as \$81,117.

Ms. Bohnen: Yes. In fact, the ministry quantified it.

Mr. Bell: All right, whatever. In fact, this property was valued at \$236,438 as of March 1972. There is no dispute as to that as far as your office is concerned. It was sold in June 1973 for \$268,000. Is that additional amount to be credited against the \$81,000?

Ms. Bohnen: That is how the formula works, Mr. Bell.

Mr. Bell: So the answer is yes?

Ms. Bohnen: From the corrected amount, which is calculated by updating the appraisal amount, is subtracted the amount of compensation actually paid.

Mr. Bell: Put some numbers on that.

Mr. Van Horne: Does that mean you subtract roughly \$36,000 from the \$81,000?

Ms. Bohnen: There is a complication. Let us ignore it for this purpose. I think when the ministry did the calculation it treated this land as two parcels and calculated it slightly differently. They took the appraisal amount, which was \$236,000, I believe, and updated it, let us say, by four per cent a month. They added all that up and came up with a figure. They then subtracted from that the \$263,000 he was actually paid, to get the difference. He gets the difference plus interest to the cutoff date.

Mr. Bell: By that explanation, we do not subtract the \$36,000, and \$81,117 is the net amount.

Ms. Bohnen: You do not subtract it a second time. That is correct.

Mr. Bell: We do not have to fool around with the \$81,000?

Ms. Bohnen: No, you do not. The ministry did the calculation and came up with these figures.

3 p.m.

Mr. Bell: Mr. Armstrong may want to comment later, if it is appropriate.

Turn to page 25 of the material, which is page 5 of the Ombudsman's report on this case. Ms. Bohnen, correct me if I am wrong, but on that page and in fact on the following two or three pages, the Ombudsman sets forth what are the essential ingredients of the complaints and the Ombudsman's position in respect to that complaint. Particularly in the first paragraph on page 25, the Ombudsman notes that one of the sources of the man's position is that because of government publications, he was led to believe the price he would be paid for his land, whether sold voluntarily or by expropriation, was valued at March 2, 1972.

Ms. Bohnen: Yes.

Mr. Bell: The Ombudsman has some comments about that. What he says is that Hoilett essentially agrees and can confirm that complaint from his inquiry.

We then go down to the last paragraph of that page and find what I categorize as the second ground of the man's position as taken forward by the Ombudsman. When he sold his property in 1973 he was paid a price that represented a March 2, 1972, valuation. He claimed that if he had known the price was not fixed and that if he waited to be expropriated, he would receive a value as of the date of expropriation, he would not have sold it. The Ombudsman goes on in the next two thirds of the page and essentially confirms that complaint.

We then get to the last ground of this man's complaint, in the second last paragraph on page 26, that he should be paid fair

market value as of the date of expropriation. The Ombudsman rejected that; so that is not a ground of complaint the Ombudsman goes with. He goes with the first two, both of which are founded in his own words on a position that he was paid or believed he was paid a fixed value as of March 2, 1972.

If that is the case, I would like you again to reconcile what this man said to the department in February 1973, where out of his own mouth he confirms that at least it was increased by one per cent a month from that date forward.

Ms. Bohnen: There are two answers to that. The first answer is that all this letter shows is that Mr. C, who received two offers for his land, could do the arithmetic to show that clearly there was some negotiating room. He averaged it out and figured out for himself that they were increasing the offer by about one per cent a month.

Any other person in North Pickering who received more than one offer could have and probably did engage in the same arithmetic, the same speculation as to what was going on. His state of mind was no different from any of these other people.

What is more important is that even if he knew there was a one per cent update, Keith Hoilett's findings and the formulae that were devised to do equity to these people and which were based on market data show that the one per cent update was inadequate to the tune of three per cent a month.

Even if it can be said that this man knew the price was going up because he had some evidence that it was going up, he still did not get a fair price. If we believe the government ought to treat like people fairly, he ought to get a fair price.

Mr. Chairman: Ms. Bohnen, perhaps I could direct this to you.

I think Mr. Armstrong mentioned the Hoilett hearings, and the people who did appear at those hearings were subjected to some sort of cross-examination or were called on to give testimony of some sort. Did that apply to everyone who appeared before Mr. Hoilett?

Mr. Armstrong: Yes.

Mr. Chairman: What you are suggesting is that by not turning in a complaint until completion of the Hoilett hearings, this gentleman avoided that kind of scrutiny. I am just wondering how you feel about that or how the Ombudsman's office feels about that sort of situation.

Ms. Bohnen: The Hoilett hearings were going on when this man made his complaint; so I do not think he would have known that he could have avoided Hoilett by complaining when he did. I do not think he would have chosen to avoid Hoilett either.

I think the final result of these cases demonstrates that state of mind, a state of knowledge on the part of any of these

people, did not really figure a great deal in the final conclusions of North Pickering, because Hoilett found that an overall impression of a price freeze had been created, and in fact a price freeze, coupled with an inadequate update policy, existed at the time.

Even if he had been subjected to cross-examination before Hoilett, I do not think--this is all speculation--it would have amounted to very much in the disposition of his complaint.

Mr. Chairman: Mr. Armstrong, you mentioned earlier that we were not going to characterize this individual as a speculator, but you said he did fall under the category of being a knowledgeable individual and, as such, he was not going to be compensated.

Ms. Bohnen, I think our counsel also indicated that there were people who could probably be defined as knowledgeable individuals who did receive compensation. I am wondering how you reconcile that, if that is indeed a fact.

We had some reference to a lawyer or a professor of law. I gather we had some reference to that, and I wonder whether that is the case or not. I do not know.

Mr. Armstrong: I know that individual because I was involved in that case before the Ombudsman and Mr. Hoilett, together with Mr. Hall, who is here. We were present. First, he was timely; he made his complaint in a timely fashion. In fact, he was one of the original complainants for Mr. Maloney's first report; so he was more than timely.

Second, he went into the Hoilett hearings and he was the first case that Mr. Hoilett heard. He subjected himself to cross-examination. It was not a particularly good cross-examination, because I was the one who conducted it. In any event, he was there, and my recollection is that he did say that he thought that land values were frozen or that, in effect, they were frozen.

It is now a long time ago, because that case was heard in December 1976, eight years ago. I had better be careful about what I say in that respect. I do not want to overstate it, but in any event he subjected himself in a timely fashion to the process. He was not clearly an experienced lawyer as this gentleman is in expropriation. Mr. C falls into a very different category.

In my respectful submission, to have the formula apply that Ms. Bohnen suggests and Mr. Bell put to her, you have to have three things.

First, you had to make your complaint in a timely fashion. That, Mr. C did not do. From day one, on each occasion the ministry said he did not make it in a timely fashion.

Second, you had to be prepared to go before either Hoilett or Donnelly. He would have been a Hoilett complainant if he had been on time. He did not do that.

Third, it would be the position of the ministry that even if he had gone there and had been timely, he is a knowledgeable person and is more analogous to the kind of person who falls with the 18, as Mr. Cornell pointed out.

He does not satisfy any of the three conditions precedent as to having the formula applied to him. He is just outside of it. There has to be an end to this, as Mr. Lane said. More than 100 North Pickering people have been compensated. Are you going to invite the rest to come forward now?

Mr. Chairman: Do any members of the committee have anything else?

Mr. Van Horne: With respect to the little aside I made to my colleague here, there is no statute of limitations, obviously. You are suggesting that common sense dictates that the complainant should have stated his case much earlier; yet on the other hand, there is no statute of limitations.

Is there any other situation--and I direct this to our counsel--any sort of precedent wherein after a prolonged period of time something like this has come forth?

Mr. Bell: None that I can think of; but then again, there is not another case like this that I can think of.

Ms. Bohnen: May I say something on this point? The Ombudsman has the discretion to refuse to investigate cases that are more than a year old. Not very long ago, two very late North Pickering residents came forward with their complaints, and the Ombudsman refused to investigate them, saying they were too late. So there is an end to this.

We are not contemplating any more North Pickering cases, but there may well be some person out there who, for God knows what reason--he has been in a coma for 15 years or something--comes to the Ombudsman and asks that justice be done. We could not close the door to that. But there are no others in the woodwork that we know about or are prepared to investigate now.

Mr. Van Horne: I guess they could ask whether in the investigation of the others you were aware of this one and, if not, I can understand why we did not hear about it.

But I think some of us who sat around on this committee a year or two or three ago and were involved with the North Pickering situation got the distinct impression last year that we were pretty well done, and here we are again. This is proof positive that there are more people than politicians who are comatose.

Mr. Chairman: Mr. Cornell and Mr. Armstrong, would you like to sum up your position?

Mr. Cornell: I do not think we need to say any more than we have said in our statement and in answers.

Mr. Chairman: Fine. Dr. Hill?

Dr. Hill: I have very little to say, Mr. Chairman, except that this was an awfully tough case for a new Ombudsman to have to tackle.

I asked my staff three questions when they brought it before me. I asked them whether the case was any different in principle from the other cases of those people in North Pickering who were compensated, and their answer was no.

I asked them if this person was a professional speculator, and they said no, that he was a residential land owner with 50 acres around him.

I also asked them if he should be subject to a means test or any tests in respect of his socioeconomic status or knowledge, and they said no again and brought me the evidence based on that.

It was on that as well as other matters that I based my decision to support this case.

Mr. Chairman: That concludes it unless someone else would like to make a comment at this point.

Mr. Cornell and Mr. Armstrong, thank you for being here today.

We are going to adjourn the public portion of the meeting, have a five-minute break and then go in camera to deliberate.

The committee continued in camera at 3:19 p.m.

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SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
WEDNESDAY, SEPTEMBER 19, 1984
Morning sitting



SELECT COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Runciman, R. W. (Leeds PC)
Breithaupt, J. R. (Kitchener L)
Cooke, D. S. (Windsor-Riverside NDP)
Di Santo, O. (Downsview NDP)
Eakins, J. F. (Victoria-Haliburton L)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Lane, J. G. (Algoma-Manitoulin PC)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Sheppard, H. N. (Northumberland PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon
Madisso, M., Research Officer, Legislative Research Service

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations
Boothby, P., Investigator
Hill, Dr. D. G., Ombudsman

From the Public Service Superannuation Board:

Cooke, B. V., Secretary
Wychowanec, S. J., Chairman; Deputy Provincial Secretary for
Justice

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Wednesday, September 19, 1984

The committee met at 10:38 a.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: Come to order, please. Perhaps you can identify yourself and your title.

Ms. Wychowanec: My name is Stephanie Wychowanec and I am the chairman of the Public Service Superannuation Board. I am joined by Ms. Sheila Porter, who is legal counsel to the board and is a member of the legal branch, Ministry of Government Services.

Mr. Chairman: Thank you very much and welcome to the committee. We are dealing with summary number 3, and I will ask our counsel, John Bell, to lead us into this case.

Mr. Bell: Thank you, Mr. Chairman. Members, you have a three-page detailed summary at the beginning of the material of this part. Dr. Hill and his staff will be paying particular attention to that.

I should tell you there are an additional four documents. These are the two I could not find about five minutes ago, Mr. Di Santo. There are four documents immediately following the detailed summary right at the beginning of your material. They are lettered A through D. These are the four material letters passing between the employer, so-called, and the director of the branch, in respect of which the Ombudsman has made his recommendation. I think the summary, together with the four documents, will serve you very well in understanding the various positions.

With that, Dr. Hill, could you tell the committee what this case is about?

Dr. Hill: Thank you, Mr. Bell, Mr. Chairman and members of the select committee.

This complaint concerns the adequacy of advice given to the complainant. It turns on the interpretation of some correspondence between the complainant's employer and the pension funds branch. My interpretation is that the director of the pension funds branch offered to supply information on the advisability of transferring pension credits from one plan to another. His offer was accepted. The director then replied, setting out the options and concluding that the complainant would be advised to go ahead with the transfer.

The complainant followed this advice. As a result, he lost, first, his employer's contributions which remained in the pension

plan and, second, the right to a pension calculated on his best three years' salary.

My feeling is that since advice was being offered the complainant should have been told about the things he would lose. He would then have been in a better position to judge whether the change of plan was worth it to him. It is the quality of the advice given in these circumstances that concerns me. That is my opening comment.

Mr. Chairman: Mrs. Boothby, would you care to elaborate on the investigation?

Mrs. Boothby: Mr. Chairman, the facts are quite simple. In 1958, the complainant was employed as a county jail employee and, as such, began contributing to the public service superannuation fund thanks to a provision in the Public Service Superannuation Act. At that time the pension offered by the PSSF was calculated on the average of the employee's highest three years of earnings.

In 1966, the complainant was offered a position as supervisor of maintenance in the jails, courthouse, registry office and other buildings outside in the county. This change of employment entailed a change of pension plan from the PSSF to the municipal plan, which is referred to as OMERS, the Ontario municipal employees retirement system, in the summary.

Before he accepted the new position, his employer, who was the clerk-treasurer for the county, wrote to the director of the pension funds branch concerning the details of the transfer of pension credits. There are four letters. The interpretation of the four letters is the basis of the Ombudsman's recommendation.

The first is dated November 30, 1966, and is marked A. It is simply the clerk-treasurer saying that one of the county jail employees is considering transferring from jail employment to general maintenance staff, and can he transfer his pension credits from the PSSF to OMERS?

The answer, marked B, is dated December 2, 1966. As you can see, we felt the pertinent paragraph was the last one, which implies an offer, "If you care to let us know the name of the employee, we could supply information with respect to the advisability of such a transfer."

The third letter, marked C, is dated December 12. The Ombudsman interpreted it as an acceptance of the offer. The sentences that we felt were particularly important start in the second paragraph: "...the committee"--the county in other words--"feel that they do not wish to do anything that would affect the complainant's pension credits with the superannuation fund. We would be grateful if you could supply information with respect to the advisability of such a transfer." That is just accepting the same words.

The final letter, marked D, dated December 14, 1966, sets out two options open to the complainant. He could either take a

cash refund of his contributions or he could transfer his pension credits. We felt the final paragraph purported to advise the second, transferring the pension credits. One thing I should perhaps point out at this point is that the actual money involved in those two options was exactly the same. The complainant in due course chose to transfer his pension credits and the amount that was transferred was his own contributions plus interest.

Mr. Di Santo: Was it the same amount he would have received if he had accepted the cash refund?

Mrs. Boothby: Yes. It is exactly the same amount. Perhaps just to reinforce that--

Mr. Van Horne: Including interest?

Mrs. Boothby: Including interest. I have the figures. The final paragraph of that December 14 letter reads, "It would appear that"--the complainant--"would be well advised to request a transfer of pension credits to the Ontario employees retirement system, rather than elect a cash refund from the public service superannuation fund."

On the basis of those four letters, the complainant accepted the new position that was offered to him and asked for his pension credits to be transferred to OMERS. The amount transferred was his own contributions and interest. His contributions were \$2,239, the interest was \$314, and a total of \$2,554 was transferred.

By moving out of the PSSF he lost the right to a pension based on his best three years of earnings. By moving out of the PSSF his employer contributions remained in the fund. His pension credits were transferred to OMERS, which at that time followed a practice of buying an annuity for people transferring into the plan. It was a deferred annuity to be paid to him on retirement. However, much later in 1978 OMERS changed its plan. It improved its plan, introducing a pension to be based on the best five years of earnings.

For people who transferred in, such as the complainant, OMERS applied a conversion formula that is written into its act and regulations, which converted the sum that had been transferred in by a rather complicated formula to a period of service. For the complainant, this gave him 41 months of credited service with a further option to buy 56 months. In other words, his eight years in the public service had translated to three years and five months in OMERS.

Mr. Bell: Can I stop you there for what I think is a critical question? Was that known? Was information available to the director in December 1966 so that he could have given that information?

Mrs. Boothby: He did not know that OMERS was going to improve its plan. What we think is that the director should have told the complainant that by moving out of the PSSF he would lose the entire contributions and would be moving away from a plan that offered a pension based on the best three years of earnings. We

felt that the advice given to him in those four letters was insufficient and inadequate. As the advice had been offered, rather than particularly asked for and accepted, it should have been fuller than it was. That would have enabled the complainant to rearrange his affairs, and he did have other options in relation to his employment.

Mr. Bell: Implicit in what you say, and I think it lacks some detail, is that in December 1966 the PSSF plan, in terms of potential, future benefits to him, was a better plan than OMERS.

Mrs. Boothby: Yes.

Mr. Bell: How?

10:50 a.m.

Mrs. Boothby: The PSSF offered a pension based on the final, highest three years of earnings, whereas at that time OMERS offered a pension based on the average career earnings. Later in 1978 it was improved.

If the complainant had stayed in the PSSF and had never moved, providing his salary remained as it is today, he would be getting a better pension, with other benefits such as being able to retire earlier, than he does in OMERS, but that is assuming that his salary, the crucial factor, would remain the same.

Mr. Bell: His pension would be better under the public service superannuation fund today, if he had stayed where he was, than it will be under OMERS?

Mrs. Boothby: Yes.

Mr. Di Santo: Is the Ombudsman saying that the director had a moral obligation to give full advice, or is he saying that he was legally bound to give full advice?

Mrs. Boothby: I think the fair answer to that is that it was a moral obligation. The advice was offered; it was accepted. The clerk-treasurer who was speaking on behalf of the complainant expressed concern. He said, "We do not want to do anything that is going to affect his credits." In those circumstances, I think that was the--

Dr. Hill: I think the up and down side of the situation, morally, should be presented, the positive and the negative. If you are giving advice, I think you are bound to give both sides, to say to the person: "Morally, these are the two sides. If you do this, this is what is going to happen. If you do the other, this is what is going to happen."

Mr. Di Santo: In other words, you are not saying that he committed the sin of omission according to the statutes, that since he offered that advice, he should have told the whole story so that the person could make--

Ms. Bohnen: To answer that, Mr. Di Santo, there is a body of case law dealing with situations like this where advice is solicited, offered, and accepted, and it turns out to be deficient. However, the Ombudsman did not analyse or argue this case in terms of that case law--rather, as Dr. Hill and Mrs. Boothby have indicated, in terms of the other obligations arising from the situation.

Mr. Di Santo: If that is the case, we are not saying that he had an obligation, according to his position, because of the law that required him to do so. However, he had a moral obligation to give full advice. If that is the case, did the Ombudsman analyse whether the pension was an important element, or a marginal one, in the decision Mr. O made to accept the promotion?

In other words, when he was offered a promotion, we do not know what the wage differential was between his previous position and the new position, and since he was 35, I think he expected to have some kind of career in the new position. Were those the prevalent elements that made him accept the new position, or was the pension a fundamental element?

Mrs. Boothby: Yes. We covered that very carefully during the investigation. The first thing is that the job he was being promoted to was a better position. It carried prestige. He was to be a supervisor. It did not carry a rise in salary at that time, but he probably got it. We have not been able to establish exactly when, but his salary has risen. However, he did not have a rise in salary when he first accepted his promotion.

His own reply to, "What would you have done if you did know what was going to happen by leaving the public service superannuation fund?" was, "I would have arranged my affairs differently." He said, "I had many options." This was confirmed to me by the clerk-treasurer when I interviewed him.

It just so happens that, later in 1967, the superintendent of the jail offered him a position as assistant superintendent at the jail. By then it was too late. I was told that he was very highly thought of, that he was very talented, that there were things he could have done within the county to retain his position as a contributor to the PSSF if necessary.

Mr. Di Santo: I found it a little bit strange that the person accepted a promotion, and then, in retrospect, would say: "Well, I had so many options. If I knew my pension would end up in this mess, I would have accepted the other options."

Perhaps the director of the pension funds branch did not give full advice, but when he said in the letter of December 14 that Mr. O would be well advised to request a transfer of pension credits to the Ontario municipal employees retirement system, do you not think Mr. O had some kind of obligation to ask himself: "Why am I being advised this? What will happen to me if I transfer my pension?" Did he actually rely completely on this advice, accepting this letter without asking any questions?

Mrs. Boothby: His answer to that was: "I did what I felt

was necessary. I went to the clerk-treasurer who handled these matters and asked him to look into how it was going to affect me to move to a new pension plan." The clerk-treasurer then made the inquiry.

The complainant has told us he did all he thought was necessary. He had made the inquiry and it looked all right.

Ms. Bohnen: Mr. Di Santo, there is evidence in the letter you have seen that the employer was also concerned that it not do anything to harm his pension credits.

Mr. Di Santo: We understand that.

Ms. Bohnen: You realize those parties were very concerned about this issue. You should also bear in mind the director of the pension funds branch is the person to go to or to have gone to for information and advice.

Mr. Di Santo: I think you will agree with me the director did not have anything in mind to harm Mr. O?

Ms. Bohnen: Not in the slightest.

Mrs. Boothby: Not at all.

Mr. Di Santo: I think it is relevant to what you said. In other words, he made inquiries and was satisfied with the results of the inquiries, but we do not have any evidence of that.

If he made inquiries, I think that unless someone was a very cruel person who wanted to mislead him there must have been some explanation. I deal every day with different cases, people who are applying for pensions under the bilateral treaty between Italy and Canada, which is much simpler. These are simple people. They come to me and they ask me: "What happens to me if I apply in Canada? What happens to me if I apply to Italy?" I explain to them and they make a decision.

Now in this case when this employee made the inquiry, he must have been given an answer and been satisfied. If I was really cynical, I would say that perhaps he made his calculation and said, "I had better accept the promotion because in the long term it is beneficial to me." Then later on he realized, "Perhaps I made a mistake."

Mr. Mitchell: Remember what you said, Odoardo. You said people come to you and you spend the time giving them advice. Is that not what you said? They see you as a person who can give them that best advice. Is this then not similar: this person went to the location where he thought he would get the best advice?

Mr. Di Santo: No, he did not go to get it. The advice was offered by the director.

Mr. Mitchell: The query was initiated--

Mr. Chairman: I think we have witnesses before us and we can wait for the deliberation to carry out this kind of debate.

Mrs. Boothby, do you still have something to say to complete your presentation?

Mrs. Boothby: I think that is it. There are various points, but perhaps I shall leave it at that.

Mr. Chairman: We do have questions. Some members still have questions.

Mr. Lane: Mr. Chairman, I was just looking at the material I have here. It seems to me that exhibit A, the December 12 letter where the clerk-treasurer advised of the situation and asked for information, was answered only two days later. In my estimation the December 14 letter answered very fully what had been asked, which was whether the pension funds branch "could supply information with respect to the advisability of such a transfer." That is what the letter of two days later says.

11 a.m.

I understood you to say the dollars were exactly the same; whether he took them in cash or transferred them, they were exactly the same dollars. I suppose the reason that the director would say it was best to transfer is that the guy would then not spend the money on something else and have no money in his pension plan.

Mrs. Boothby: I think the sequence of those letters is that the inquiry came in a very innocent kind of way, "Can an individual transfer his pension credits?" Back came the answer: "Yes, of course he can transfer his pension credits. Let us know who he is," and so on, but it ended up with this paragraph in exhibit B, "If you would care to let us know the name, we could supply information with respect to the advisability of such a transfer." That very phrase was picked up in the next letter.

We felt the clerk-treasurer interpreted this as an offer to advise. He ends up his letter, exhibit C, "We would be grateful if you could supply information with respect to the advisability and we do not want to do anything that would affect the complainant's pension credits."

Mr. Lane: I do not think the director could have known at that time that there were going to be some changes in the pension plan two years down the way.

Mrs. Boothby: The loss did not result from the changes to OMERS pension plan. That has improved the loss.

Ms. Bohnen: Mr. Lane, at the time that the director gave advice, PSSF was a better pension plan than OMERS. What the Ombudsman believed was that the director should have explained fully to the employer for it to be passed on to the complainant that he was better off if he could arrange his affairs this way to remain a member of the PSSF. In giving him advice that it was advisable to transfer into OMERS, certainly that was better than

taking a cash refund of his own contributions, but it was not better than staying in the PSSF.

Mr. Lane: No one knew that at that time.

Ms. Bohnen: Yes, they did know that.

Mrs. Boothby: I think they did know that.

Ms. Bohnen: Yes, they did.

Mr. Lane: You are saying that if he had had proper advice, he would not have taken the new position?

Ms. Bohnen: He had other options at the time.

Mr. Lane: That is what he tells you. We are not basing our case on that. There was no other option. I could sit here and believe I have all the options in the world, but really I do not have them, they are only in my mind.

Ms. Bohnen: I think it was more than in his mind, Mr. Lane. We know from interviewing the county and from the documentation that they were also concerned about his pension credits and that there was, one, the possibility of other kinds of employment in the county, either at that point or some time later in the year, or, two, the man simply could have arranged his affairs differently at the time, but I think it is more than speculative.

Mr. Lane: That is in hindsight, but we often look back and say, "I could have done better if I had known."

Mrs. Boothby: There is definite proof. Later that year he was offered a job in the jail. If he had stayed in the jail he would have remained a member of the PSSF.

Mr. Hodgson: That was his choice.

Mr. Lane: That was if. That is i-f, if.

Mrs. Boothby: The clerk-treasurer whom I interviewed told me that something else could have been worked out for him. To use his words when I interviewed him, he said, "A grievous injustice has been done."

Ms. Wychowanec: Mr. Chairman, I presume I am going to have an opportunity to speak?

Mr. Chairman: You will have an opportunity.

Mr. Lane: I do not want to continue with this line of questioning, Mr. Chairman. I have a personal feeling that the guy would have taken the offer in any case. The dollars were exactly the same at that time and he probably is the beneficiary now because he did take the offer, even though his pension is not as good as it may have been. That is my personal feeling.

Mr. Mitchell: My questions are going to be directed to those from the pension funds area.

Mr. Chairman: Perhaps you could wait until they give their presentation.

Mr. Sheppard: Just following up on Mr. Lane, when he got this advice, was it not Mr. O's responsibility to make his choice?

Mrs. Boothby: It was certainly his own action in accepting the promotion, if that is what you mean.

Mr. Sheppard: Yes, but he had the money. Was it not his prerogative, whether to pull it out or reinvest it? Did he not have that chance?

Mrs. Boothby: He had two options. He could have taken the cash refund of his pension credits or transferred them to OMERS. It was entirely his own election in choosing to transfer them to OMERS.

Mr. Sheppard: Then he decided. He made the wrong decision and now he wants somebody to bail him out?

Mrs. Boothby: Of those two options, he did not make the wrong decision. It was the right decision. If he had known, however, that when his pension credits were transferred to OMERS he would lose the right to a pension based on the best three years of earnings and that his employer contributions would not be transferred, he has told us he would have made other arrangements to avoid changing pension plans.

Mr. Sheppard: But did he not have the prerogative to make that decision? He was the one who made that decision at that time on the advice which was given to him.

Mrs. Boothby: Yes.

Mr. Sheppard: Nobody twisted his arm.

Mrs. Boothby: Not at all. No. The Ombudsman felt that there should have been more advice, further information.

Mr. Sheppard: Yes, but lots of times we make decisions and we wish we had had more advice. I am sure you have been in the same boat.

I just question it. He had the advice, he made his decision, he made the wrong decision, and now he is looking for somebody to bail him out, because if he had made a different decision, he would have ended up with more money.

Ms. Bohnen: That is so, except that the advice came not from a man on the street but from the director of the pension funds branch, who offered to give advice as to the advisability of the transfer.

Mr. Sheppard: They gave him that advice and yet it was his decision to do whatever he wanted.

Ms. Bohnen: Yes, but the Ombudsman felt that if the advice had been more complete, it would have given this man the opportunity to make a better decision.

Mr. Sheppard: How many years later did he go to the Ombudsman?

Mrs. Boothby: We can deal with that. He only realized in 1978, when the Ontario municipal employees retirement system changed its plan, what had happened.

Mr. Sheppard: Yes, but OMERS did not know they were going to change the plan when he had this advice.

Mrs. Boothby: No, they did not know either. It was a letter that OMERS wrote to him in 1978 saying: "We have introduced a different type of pension and we have converted the sum of money that was transferred in. Your eight years of pension credit in the public service is now three years and five months in our plan. Do you want to buy the extra?" That is how it came to us.

Mr. Sheppard: This is later information that was not available to anyone eight years ahead of that.

Ms. Bohnen: That is exactly why he did not complain until then.

Mr. Sheppard: Yes. But I question why he is complaining now, eight and a half years later.

Mrs. Boothby: His loss was not due to what OMERS did. That, in fact, has lessened his loss. His loss was due to moving out of the public service superannuation fund and not having the benefit of the three years--

Mr. Sheppard: Yes, but that was his decision.

Mr. Mitchell: I have a supplementary. On changing jobs, could the employee have continued to contribute to PSSF?

Mrs. Boothby: No. There was a provision in the Public Service Superannuation Act at that time--which actually had been repealed, but because he had started employment earlier he was lucky to benefit from it--that jail employees should contribute to the public service superannuation fund.

Mr. Mitchell: So the option he had open to him was to take the job or not take the job, or take the money and invest it in a private plan.

Ms. Bohnen: Or go back to the employer, who was very interested in this, and come up with a different arrangement which would have permitted him to stay in the PSSF.

Mrs. Boothby: If he had stayed working in the jail, he could have stayed in the PSSF.

Mr. Mitchell: So this county maintenance position was not in the jail.

Mrs. Boothby: It included work in the jail, yes. It simply gave him more buildings to look after.

Mr. Mitchell: I see. Thank you.

Mr. Cooke: What I want to be convinced of is that his options at that point were to stay in that pension plan and stay in that job; move to his other job and transfer pension credits; take the money and do something privately; or, as you say, work out something with the employer. I am not convinced at this point, even though the salary of the new job at the time was the same, that over the period of time he was in that job he lost.

I cannot believe that a 35-year-old would make a determination of whether or not he or she was going to take that promotion solely based on the pension credits for that period of time. One has to look at one's wage potential for when he or she is working, as well as the pension. I cannot be convinced, at this point, that he actually lost money. I would like to know what his wages differential would have been over that period of time, as well.

11:10 a.m.

Mrs. Boothby: Yes. His loss today is in the area of speculation. If he had stayed in the public service superannuation fund, and if he was earning exactly what he is earning today, he would be able to retire earlier with a better pension. But that is if--

Mr. Cooke: But that was not one of the options, regardless of what advice was given.

Ms. Bohnen: I think it is important to remember that the employer was keenly interested in coming up with an arrangement for this man that would have no detrimental effect on his pension.

I think you are probably right that there was more potential for salary growth in the position he accepted than there had been, but I do not think it can be discounted that other arrangements were possible. There was the job later on that same year as assistant superintendent within the county. Something else would have been devised for him.

Mr. Cooke: Did he know that job was coming up, though? These are all options and we are guessing whether he knew that this was going to be a future option.

Ms. Bohnen: The best evidence we have is what he and the clerk-treasurer of the county have to say about what they would have done, which is--

Mrs. Boothby: Which is that they would have made other arrangements for him. If they had known that he was going to lose by moving out of the public service superannuation fund, they would have made other arrangements. The clerk-treasurer has said that and he himself has said that.

We just felt that because it had been offered, and because he had taken up the offer, he was entitled to a little bit more of an explanation than he had, to put him in the picture.

Mr. Cooke: No, I understand your position and I have some sympathy for it. However, I am concerned that what we are saying is that the individual could opt for the higher salary and the job which was better career-wise and career earnings-wise and, at the same time, be guaranteed the best of the two pension plans so that he gets the best of all worlds. This is what we are basically saying.

Mr. Hodgson: Was Mr. O's job advertised, and did he apply for it, or did he go to ask for the job? Did the county come to him and say, "We have a job which we would like you to take"?

Ms. Boothby: Yes, the county came to him.

Mr. Hodgson: The job was not advertised or anything.

Mrs. Boothby: No. It grew, in a way. He had been maintenance officer at the jail. He started doing work outside the jail; being a public servant, he was lent out, contracted out to do work outside the jail. He was satisfactory, and eventually he was offered the position of supervisor.

Mr. Hodgson: An opening came up, and they went to him and said, "Mr. O, we would like you to take this position." It had to be at a higher rate of salary or he would not have taken it.

Mrs. Boothby: It was not at a higher rate of salary, to begin with. It certainly carried more prestige. It was a better job.

Mr. Hodgson: I do not know what the advantage in taking it was if the salary was the same, unless there was less work, or he would be able to use his skills better in the new employment. I do not know. I am sure there were lots of people who, if they knew the position was open, would have been applying for it.

Mrs. Boothby: Yes.

Mr. Hodgson: Maybe with just as many qualifications as Mr. O had.

Mrs. Boothby: I do not know whether other people applied. I know that it was offered to him.

Mr. Hodgson: With these county jobs, it is pretty well known--not throughout the community, but among the county employees--that there is going to be an opening. We do not know

whether there was someone else who would have liked that job or not, but this job was offered to him.

Mrs. Boothby: Yes.

Mr. Hodgson: He must have done a little bit of canvassing or shown a desire for the job, or else they would not have come to him.

Mrs. Boothby: I must admit I did not search into how desirable the job was to the outside world. All I know is that it was--

Mr. Hodgson: I was not talking about the outside world in particular; I was talking about the inside world, that of the county employees.

Mr. Cooke: Let us hear it from the (inaudible) people and find out why they did not give good advice.

Mr. Chairman: Mr. Bell has some questions before we move on.

Mr. Bell: Forgive me, but I have to go back. What is it you say the director omitted to tell the person? I know one. You say he omitted to tell the person that his pension would be based upon the general average of all his years of service versus three years. Is that correct?

Mrs. Boothby: Yes. He could have said two things--

Mr. Bell: That is one thing: amount of benefit. Okay? What else do you say the director omitted to tell this gentleman that, had he known, he would have "made other arrangements"?

Mrs. Boothby: He should have told him that his employer contributions would not be transferred across. If you look at exhibit D, by setting out the two options, A and B, in that way and by referring to one as a cash refund and to the other as a transfer of pension credits, one is implying two different amounts of money when they are the same.

Mr. Bell: Okay. That is fine. Is there anything else you say the director omitted to tell him that he should have?

Mrs. Boothby: No. Those were the essential things.

Mr. Bell: Those were the two things. Do I understand the chronology to be that it was not until the Ontario municipal employees retirement system announced the change in the basis of its pension plan in 1978 that the man became concerned that he was in a plan not as good as his former plan?

Mrs. Boothby: No. At that time he realized his eight years in the public service translated into three years and five months.

Mr. Bell: Then when did the man first realize that the amount of the benefits he would be receiving on retirement under OMERS was less than he would have received had he stayed in the former plan?

Mrs. Boothby: I think he would have known--

Mr. Bell: No, do not think. When did he know?

Mrs. Boothby: It is likely he would have known that the amount transferred into OMERS would be purchasing him an annuity payable later on; so he would have known that he was to get a sum of \$800 a year at retirement. That was under the old system.

Mr. Bell: If he had stayed in OMERS, he was going to get a pension based on his best three years.

Mrs. Boothby: Yes.

Mr. Bell: That is of 1966.

Mrs. Boothby: If he had stayed in the public service superannuation fund.

Mr. Bell: Right. He transferred and he was to be paid something less on retirement.

Mrs. Boothby: It would not have been clear whether it was something less; it was an entirely different type of pension. When he transferred into OMERS, he was told: "Twenty-five hundred dollars is being transferred across. We are buying you an annuity. This will be paid to you later on."

Mr. Bell: And nobody told him how much it would be?

Mrs. Boothby: They told him it was going to be about \$800 a year. The comparison, if you want to set them out, is eight years of credited service in the PSSF as opposed to an annuity payable at age 65 of \$800 a year. It is very difficult to compare the two unless one sits down with facts and figures.

Mr. Bell: Okay. That is fine. When did he first learn that his employer contributions under the old system would not be transferred into the new system?

Mrs. Boothby: In 1978, when OMERS wrote to him and said: "We have done this conversion. We are not going to pay you a deferred pension after all. We have converted your money into a period of credited service again." He was then able to compare the eight years that he had in the PSSF with the 41 months that he got in OMERS.

Mr. Di Santo: May I ask a supplementary? I think it is very important. In other words, you are saying that when there was this exchange of correspondence, he was not told that only his contributions plus interest could go into the new plan but not the employer's contribution.

Mrs. Boothby: He was not told that.

Mr. Di Santo: He was not told. In other words, the omission of the information on the part of the director was really detrimental to him. It was a piece of information that was very important for him to make a decision.

Mrs. Boothby: That was the Ombudsman's position, yes.

Mr. Cooke: His pension was invested?

Mrs. Boothby: No.

11:20 a.m.

Mr. Chairman: Ms. Wychowanec, your time has finally arrived.

Ms. Wychowanec: Thank you, Mr. Chairman. I hope the committee will bear with me, but I would like to go through the chronology of some of the events that occurred with respect to this complainant.

As was stated earlier, the complainant began employment with the Ontario county jail in December 1958. Because he was a full-time employee, he was able to contribute to the public service superannuation fund. The first date that is important is 1958.

The next date, which has not been referred to but which I think is also important in understanding what happened, is April 1962. After that particular date, all the employees working at the jail had to belong to the Ontario municipal employees retirement system. The complainant stayed in the PSSF because of a grandfather clause.

After 1966, some of the employees were paying into OMERS and some of the employees continued to pay into PSSF. I must assume, then, that the employer was familiar with both plans, because he would have to explain the plan to the new people coming on so that they were not totally uninformed about what the pension benefits were under OMERS and what the pension benefits were under PSSF.

The next date that, again, I think is important is January 1, 1966. It does not affect the complainant, but it is important because that date indicates a time when the Public Service Superannuation Act was amended.

Prior to January 1, 1966, the employee did have his pension benefits calculated on the best three years of service, that is, his highest three years of payment.

After that date, the calculation was based on the best five years of service, but, again, because the complainant had joined the jail service prior to 1966, he was protected by a grandfather clause. The only reason I am mentioning this date is to indicate that there are events happening which neither the complainant nor the pension plans have any control over.

We understand that in November 1966 the complainant was asked to take a promotion to become supervisor of maintenance for the courts and the registry office. Since the complainant is no longer a full-time jail employee at that time, he cannot continue to contribute to the superannuation fund if he takes that promotion. He has to go into OMERS.

At that point, we get the series of letters, and I would ask the committee to look at those letters very carefully. The first letter is dated November 30, 1966. It is from the clerk-treasurer of the county.

Mr. Di Santo: Which letter? Sorry.

Ms. Wychowanec: November 30, 1966. This is what he says: "One of the county jail employees is considering transferring from the jail to our general maintenance staff." Here is the statement: "He is at present on superannuation."

That can be interpreted in a number of ways. It can be interpreted that he is in receipt of a pension in any other way, but it is not really a correct statement of the facts because he was not on superannuation, if you read it at face value. He was in fact a contributor. That is an unclear statement from our point of view.

This is a straightforward question. The next paragraph said: "Would it be possible for this employee to transfer his credits in the superannuation fund to the Ontario municipal employees retirement system? This is the plan which covers the majority of our employees."

I am not sure what he means by "This is the plan," because, as I told you earlier, there were two plans that covered those employees. People who had come into employment prior to 1962 were still paying into the superannuation fund and those who came in after that paid into the OMERS fund.

Mr. Di Santo: This is the majority.

Ms. Wychowanec: Yes, but I am not sure which majority he is referring to. In any event, there is, again, an element of uncertainty there.

The last paragraph says: "Would you please advise of your decision as soon as possible." This is the sentence that I find interesting: "He wishes to transfer on January 1, 1967." To me this indicates that the complainant had already made up his mind: "He wishes to transfer on January 1, 1967."

Given some of the vagueness in this letter, if you will, the uncertainty in it--

Mr. Cooke: Given the vagueness in the letter, could you say that you would expect a clerk-treasurer to be familiar with the two pension plans?

Ms. Wychowanec: I do not understand that. As an employer I would expect that someone in his office would be familiar with it, because certainly if someone were coming in to be employed in that jail he would say, "This is your salary and incidentally you are going to be covered by Ontario municipal employees retirement system." I would expect the person to respond, "Well, what am I getting under OMERS?" so he would have to be familiar with it. Someone would be. I am not saying the clerk-treasurer was necessarily the one.

Mr. Cooke: County governments are not quite as sophisticated as Metropolitan Toronto.

Ms. Wychowanec: I agree with that.

Mr. Di Santo: Also, when he said "your decision," he probably meant "your advice."

Ms. Wychowanec: This is what happened. The letter comes in. This is the information that is conveyed to us.

There was a very prompt reply saying that not enough information was supplied, but that if he is a contributor and "had at least 10 years of credit in the public service superannuation fund, he would have the option of a transfer or an annuity from our fund. Such an annuity would be payable immediately if he had attained the age of 60; otherwise, the annuity would be deferred until he reached age 60."

It also states that yes, they can transfer, but then says, "If you care to let us know the name of the employee, we could supply information with respect to the advisability of such a transfer." The first letter is very unclear. We do not know how long that employee has been with the county. We do not know his age. We do not know anything about it.

The next letter that comes in--

Mr. Chairman: Before you move on to that next letter, the Ombudsman has put great emphasis on that last paragraph--"with respect to the advisability of such a transfer."

Ms. Wychowanec: Yes. Let us take that in the context of the first letter, because the question asked in the first letter is very specific. "Would it be possible for this employee to transfer his credits in the superannuation fund to the Ontario municipal employees retirement system?" You must read the response of December 2 in the context of the first question.

Surely that indicates the advisability--perhaps in retrospect, "advisability" was not as good a word as could have been used--but he still is referring to the transfer. The question was whether he could transfer and that surely has to be related back to the first letter.

Mr. Chairman: I have difficulty with that but go on.

Mr. Epp: That is the first letter that makes that clear.

Ms. Wychowanec: The letter of December 12 comes back and says in effect: "Well, this is the person. We do not want to affect his pension and let me have your advice." The response goes back on December 14. Again I draw your attention to the second paragraph. The letter says, "If"--the complainant--"were to terminate his employment with the county jail on December 31, 1966, he would have the option of," then sets out what the options are, but those options are predicated on that assumption--"if he were to terminate his employment." It is in that context that those options are set out.

Mr. Cooke: You were complaining that the first letter was rather unclear. The second letter sets out the ground rules by which he wants to be advised. That said he did not want the pension credits affected.

Ms. Wychowanec: I agree, but the response is clear to me. The response is limited--if he were to terminate, those are the options.

We understand that in December 1966 the claimant accepts the promotion to general maintenance supervisor. The Ombudsman tells us there was no increase in salary. We have made some inquiries and our understanding is the complainant's salary was approximately \$7,400 on promotion. Had he stayed in his position at that time the salary would have been \$6,720, but this is second-hand knowledge and we are certainly not stating those are the facts. This is what our understanding is.

11:30 a.m.

Since the question was raised in the committee, if the complainant had stayed in precisely the position he was in in 1966 without the promotion, he would have held the position of maintenance mechanic 3. We understand that the maximum salary for that position is \$23,960. We understand his salary in his current position is \$35,275.

I give you that information, which is to the best of our knowledge, because questions were raised as to what would have been the differences.

In December 1967 the funds are transferred, and I believe this is the only time that the pension benefits branch has direct contact with the complainant. There is a letter of December 18, 1967, which I do not believe you have as part of your information. It reads as follows:

"In December 1967, \$2,554.59 was transferred from the public service superannuation fund to the Ontario municipal employees retirement system on your behalf. The following tabulation will indicate the breakdown of this transfer: contributions from December 8, 1958, to December 31, 1966, \$2,239.91; interest to November 30, 1967, \$314.68."

There is another paragraph to this letter which I would like to draw to your attention. The letter goes on to say:

"It is anticipated that Mr. Tyson, supervisor of pensions, Ontario municipal employees retirement board, will advise you with respect to your additional credit in the Ontario municipal employees retirement system resulting from the transfer."

So he does tell the complainant that he expects a Mr. Tyson will be in touch with him to tell him what the contributions mean as far as his pension is concerned.

Again, there was a question raised in the committee this morning as to the comparability of the two pensions at December 31, 1966. The calculation that we have made within the branch is as follows.

The transferred contributions--the \$2,239.91 plus interest--established a deferred pension of \$796.39 per annum under the OMERS plan. If the rules under the Public Service Superannuation Act were applied, the money in his account would have given him a deferred benefit under our plan of \$825.89.

The difference at that time between what he got under OMERS, which was based on career earnings, and the credits he had in the superannuation fund, was \$29.50 per year. The two funds were very close together.

Mr. Di Santo: Even though the plan he belonged to provided that he would receive a pension based on the best three years and OMERS on the average, the difference would be only \$29?

Ms. Wychowanec: You have to take into account that the pension under the superannuation act is based on the years of service; it is two per cent per year, and it is based on your three best years of salary. He had been working from 1958 to 1966, not a very long period of time. You take two per cent per year and the best three years and then you defer it to when that pension vests, which would be some time in the future, because it was not payable immediately at that time; he was not entitled to it at 35. The difference between the two was only \$29.50.

Mr. Di Santo: But if you look at the situation as it was then, the average and the three years--

Ms. Wychowanec: How can you look at it any other way except as it was then?

Mr. Di Santo: The average and the three years are equivalent, because there is no upward movement in his salary. But in perspective, if he had stayed with OMERS, his pension would have increased as his salary went up.

Ms. Wychowanec: The OMERS pension was based on career earnings. In effect, what you paid in would buy you an annuity, and that is what you would get out. The difference in 1966, according to our calculation--

Mr. Di Santo: What I am saying is that it is not a good comparison.

Ms. Wychowanec: It is the best comparison you could make with respect to 1966. You could also make the comparison that if he stays in his current position and does not go into OMERS, he may or may not get a promotion. Who knows what is going to happen? That was the fact at that time.

The next date that has some relevance is 1968, when the Administration of Justice Act was passed, and all the jail employees came back into the Public Service Superannuation Act. Of course, the complainant was not a jail employee and so he was not affected. He continued to pay into OMERS.

In 1978, the OMERS plan was amended, as you have been told. They changed the rules of the game. The pension was not based on career earnings. It was changed to the best of five years, and it also provided for special conversion formulas. This is what triggered the complainant's interest in his fund.

He went into the fund on December 31, 1966, and 12 years later, the fund has changed. In July 1978, he was advised that because of the changes in the fund, he could pick up some additional service, and it would cost \$6,500. We are led to believe that, when he got this letter, he suddenly realized that his plan was different and that he did not get everything he thought he was supposed to get.

This was July 1978. He did not do anything, we understand, until May 1981, three years later. He considered the problem for the next three years, apparently. In 1981, he went to the Ombudsman and complained about the advice given to him. He complained that he had lost the best three years, because now the OMERS plan has the best of five. He complained because he had lost the employer's contribution. That is 12 plus three--15 years after the event. It is a long time.

The Ombudsman moved fairly quickly on this issue. This is where we are now. The Ombudsman has made his finding and recommends that reasonable compensation be given to the complainant because of the advice given in 1966.

There are a number of issues that have to be considered in this complaint. You all agree, I believe, from what I have heard, that the issue has to be decided on the facts known in 1966. You cannot use your 20-20 hindsight and say, "If he had known what would happen in 1978, perhaps he would have done something different." The letter that prompted the inquiry in the first place asked a specific question: "Can the fund be transferred?"

"Yes, they could be." That is what the answer was. The answer to the next letter was couched in terms of, if he would terminate, these are the options he has. The advice given in relation to those two options was probably the best advice at the time. It was better to put that money into a pension plan than to take a cash payment and perhaps do something else. From a very conservative point of view, that was probably the best advice given.

11:40 a.m.

The other thing is: who is the onus on? Is the onus on the employee to find out what the pension plan is all about? We know that employees in that area belong to two pension plans, the OMERS plan and the PSSF plan. Surely there must have been some discussion about the relative merits of the two plans, some idea of what the two plans gave, and how they were calculated.

I would hope that the employer, the county jail, would be familiar to some degree with what was in the two plans and would be able to give some advice.

The question that came to us was, can they transfer? The answer was yes. Is there an onus on the employee to seek further information? Is there an onus on the employer to provide full information? Is the onus solely on a person who is not really involved in this transfer, on the basis of a letter saying, "If you gave me a little more information, I could probably give you better advice," and putting out the option very clearly, "If you terminate, this is what is going to happen"?

We have a problem with this undue delay. The advice was given in 1966. In 1981, the issue comes forward. We have no idea what could have occurred in that intervening period.

I went through the dates because I wanted to indicate that there were extraneous forces working on this. We know, for example, that in 1962 the rules of the game were changed. After a particular date, the employees who had been paying into the superannuation fund, the same employees doing exactly the same job, would be paying into another fund.

We know that in 1965--again, beyond the control of anybody--the province changed its own act. We know that in 1968 there was another legislative change. In 1978, there was another change. During the career of this employee, we do not know what other changes may come in the future. Is the advice given in 1966 to be determined on what the state of the facts is today, or is it to be determined on what the state of facts will be when he retires?

Suppose the superannuation fund is changed, and says, "Everybody will go on a best of five years system." Will that make the advice proper? What if the Ontario municipal employees retirement system plan is changed again, and it says, "Everybody goes back to three years"? Is that going to make the advice proper?

When do you make that determination--when the employee retires? Do you have to look back and say: "These were the facts in 1966. Was the advice reasonable?"

The effect of this decision, whatever decision the committee and the Ombudsman make, will certainly affect the kind of advice--I use that word in quotation marks--that the employee benefits and data services branch will be giving to people in the future.

If the employee benefits branch will be deemed to have acted unreasonably, or not to have been able to foresee that there would

be a change 12 years later, and they are going to be held to the kind of advice they gave, given a certain set of particulars, their actions are going to be judged on the basis of something that happens 12 years later. I am sure that the "advice" will be taken with circumspection.

I do not think many people will get very elaborate advice. All they will get is a calculation. This will apply not only to employees in the superannuation fund but to people covered by the Legislative Assembly Retirement Allowances Act. It will certainly cover the judges.

Our people will simply not be giving that kind of advice. We cannot foresee what will happen 12 years down the road.

The other problem we have is the Ombudsman's recommendation that reasonable compensation be given. We have the problem of the long delay, more than 15 years now. We have no idea what the career path of the complainant would have been in that time.

I told you earlier that if he had stayed in the same position he was in when the request came in there would have been a significant difference in salary. Maintenance mechanic: maximum \$23,960. His position is building superintendent, \$35,275. How are you going to calculate that difference? He has obviously benefited in salary from the promotion. Does that offset any disadvantage as a result of changing the fund? I do not know. I have no idea how that would be calculated if that is the decision of this committee.

There is a final point I would like to make. In our response to the Ombudsman, we were quite clear on this issue. We disagreed with his conclusion, but even if we had agreed with it, we at the board have no authority to make any kind of payment out of the fund in respect of this particular situation. I do not speak on behalf of the ministry itself, but the board cannot make a payment of this sort out of the fund. If it is the decision of the committee that the board is responsible for the actions of the employee, then we will have to have some legislative changes made to the act to permit such a payment.

Those are my submissions.

Mr. Chairman: Mr. Mitchell?

Ms. Wychowanec: Mr. Chairman, may I have your indulgence for a moment, please?

Mr. Chairman: All right. Go ahead.

Ms. Wychowanec: I was just reminded that the committee members did speak about other options, and I believe the Ombudsman's representative also said the complainant had other options in 1966.

The other options were not put before Mr. MacDonald. There were no options put to him, in fact. The question was, "Can you transfer?" We have no idea what other options the complainant had

in 1966. Did he have the option to stay on? Did he say this or that? We cannot really comment on that.

Certainly there may have been all sorts of options in the intervening years. We do not know what opportunities were given to the complainant.

Mr. Mitchell: Would it be fair to say that the people working in the employees' benefits branch and in the pension branch, because of the very nature of the work they are doing, could be considered to be more expert with regard to pension matters and employee benefits than the employee himself or herself?

Ms. Wychowanec: I would hope so.

Mr. Mitchell: You would hope so? Then how would you identify the duties of the director of the pensions branch when a query is made for information? What would you see as the responsibilities? You have acknowledged that they should be experts.

Ms. Wychowanec: All right. I have to go back to the nature of the letter that was first sent to the--

Mr. Mitchell: I accept that the first letter asked, "Can it be transferred?" but let us go on to letter B.

Ms. Wychowanec: All right. Letter B is the letter--

Mr. Mitchell: I believe it is in the last paragraph.

Ms. Wychowanec: It says, "We would be grateful if you could supply information with respect to the advisability of such transfer."

Mr. Mitchell: No. The one from the director which says, "If you can supply us with the name"--

Ms. Wychowanec: I am sorry. I thought you were referring to the letter from the clerk-treasurer. "If you would care to let us know the name of the employee, we could supply information with respect to the advisability of such transfer."

Mr. Mitchell: Okay. Put aside the changes that have occurred in OMERS in that time span, because I do not think they have any importance at this time. As an individual, if I had a letter such as the one of which you have just read the last paragraph, saying basically--I am paraphrasing--"If you will provide us with the name, we will try to lend what assistance we can," it would strike me, bearing in mind that the people in this branch are experts, that they should know exactly at that time just what transfer is made. They surely would know that.

Ms. Wychowanec: Certainly.

Mr. Mitchell: It strikes me--and I am contrary to my colleagues here, I guess--that there was a very definite responsibility of the director to say, "However, if you do this,

the only transfer is of your own contributions." It seems to me you are saying the director did not have that responsibility by the mere fact that the question was asked and he replied, "If you can give us the name, we will try to give what information or assistance we can."

11:50 a.m.

Ms. Wychowanec: That is right. The first letter referred to whether it was transferable, but the letter was not very clear. We had no idea who was involved or how it was going to work. We knew there were people in OMERS. We knew there were people in the superannuation fund.

The first letter was not very clear, so we had to have a little bit more information. We got a little bit more information--and I stress it was a little bit more information--

Mr. Mitchell: At the request of your director all that was asked for, however, was the person's name, so they might be of more assistance.

Ms. Wychowanec: All right, and they did. They said "If"--"If he terminates--"

Mr. Mitchell: If they are prepared to go that far and give that much information, why should they not be prepared to give every bit of information and provide their expertise to the person who made the inquiry?

I am sorry, but I feel that when someone is an expert in his field--as has been acknowledged--then that person should realize he has knowledge that perhaps the employee does not have.

Ms. Wychowanec: But in this particular instance you are placing the total onus on one party and totally ignoring the onus that is placed on the individual--

Mr. Mitchell: He went to the expert.

Ms. Wychowanec: No, he did not go to the expert, with respect. The letter is not from the claimant. The letter is from the clerk-treasurer, the employer, and I would hope the employer is also responsible to give his employee some sort of indication of what his options are.

Mr. Mitchell: I tell you this quite honestly, having served on municipal council for a number of years, even dealing with OMERS the municipal council did not always have all the answers. It had to write specifically.

Ms. Wychowanec: It is also not an onus on OMERS.

Mr. Mitchell: I see certain responsibilities in a number of directions, but at the same time the query, in my opinion, was directed to the director of the pensions branch, who did make the offer to assist--

Ms. Wychowaneec: And he did.

Mr. Mitchell: --and I feel that by going to the extent he did, by suggesting, "You had best not take a cheque, but you should do this and transfer," he also took on himself a certain onus--himself or herself, I do not know who the director was--to ensure that every piece of information--because you have acknowledged he is the expert--was provided to the person. I am sorry, but that just happens to be the way I feel.

Mr. Chairman: Mr. Bell has a supplementary on that point.

Mr. Bell: With that letter B, on the question of who has the onus, it is a proper question to put but I suggest to you if you take off the last paragraph, and the man signs it there, he did what the first letter asked him to do. Nowhere in that first letter was there a request for advice on the advisability of such a transfer.

In the second and the third paragraph he answered what he was asked. Had he stopped there, there would have been no further communication. That is another way of looking at it, to which you may or may not want to respond.

On the question that the onus should not be borne entirely by the director, I guess using some legal parlance, he has assumed some duty by volunteering matters in the last paragraph. Now, the next question is, what is the nature and the extent of that duty, and that is for the committee to decide.

May I ask one other thing, though? For someone to be entitled to compensation someone has to suffer a loss. You have given us some calculations and some figures on the comparative salaries today--former position, current position. The Ombudsman is of the view that if this man were to retire today he would receive less of a pension under his present plan than he would have received had he stayed with the other one. Are you able to comment on that?

Ms. Wychowaneec: I cannot give you a definitive answer on that because I do not know whether the calculation of his pension--if he remained within the employee group he was in in 1966 and we took the salary of \$23,900 and did a calculation on that basis and then did a calculation on the other basis, I do not know what the answer would be.

Mr. Bell: We just have not done that.

Ms. Wychowaneec: No, we have not done it.

Mr. Bell: You told us about the two per cent for your best three years under the PSSF.

Ms. Wychowaneec: Yes.

Mr. Bell: It is five years under OMERS. Is it also two per cent on the best five years?

Ms. Wychowanec: Can I have your indulgence, please, Basil? Is OMERS based on the two years as well, or is it five years?

Mr. B. Cooke: Five years. This is a point--

Mr. Chairman: I am sorry. If you are speaking you will have to come forward, please.

Mr. B. Cooke: I wonder whether I could help the committee here.

Ms. Wychowanec: Mr. Chairman, this is Basil Cooke. He is the manager of the employee benefits group.

Mr. B. Cooke: I am also secretary to the superannuation board.

You all mentioned that the director is supposed to be an expert on pension funds. We try to be an expert on the public service superannuation fund and know OMERS exists, but I will have to look up my records to answer the question. I do not claim to be an expert on OMERS and I do not think my predecessor was, either.

Mr. Cooke: He should not have volunteered the information then.

Mr. Di Santo: I would like to ask a question about OMERS. The letter of December 18, 1967, was not solicited by the employee but was in answer to the office of the director.

Ms. Wychowanec: I am sorry, I did not get that.

Mr. Di Santo: The letter of December 18, 1967, that you mentioned was not in answer to a letter of the employee but was a letter that came from the director's office.

Ms. Wychowanec: Yes.

Mr. Di Santo: Right. Do you agree that when the advice was given and Mr. O received a calculation of what his pension would be or the conditions of the transfer in detail, the onus would have been totally on him to decide and you would not be here before us today? Since he was advised--in fact the letter says he would be "well advised to request a transfer"--

Ms. Wychowanec: If he terminates.

Mr. Di Santo: That was the condition, because if he did not terminate there was no reason for him to ask for a transfer. That was the basic condition. He had been offered a promotion and he wanted to know what the conditions would be if he accepted the promotion. The director said that if he accepts the promotion he would be well advised to request a transfer.

Do you not think in that advice he was being told that was the best of all possible worlds for him?

Ms. Wychowanec: He is not addressing the question of whether the complainant should take the promotion. He is saying that if he takes the promotion and if he terminates, then under those circumstances he would be wiser to transfer the funds from one pension fund into another pension fund rather than take a cash refund. He is not advising on whether a promotion is in his best interests.

Mr. Breithaupt: Nor is he advising whether the pension credit transfer from one plan to the other would necessarily be to his advantage. It is a matter of saying, "Transfer the credits rather than take the cash." That is all the advice was, was it not?

Mr. Di Santo: I do not think this employee would have complained if he was given wrong advice on the promotion because that was not the responsibility of the director of the pension fund. The question was directly related to the pension. The director told him that in relation to his pension the best option was to transfer the funds.

Ms. Wychowanec: Of the options to take the money or not take the money, he was told he was better off not taking the cash.

12 noon

Mr. Di Santo: In retrospect this employee said that was the wrong advice, because if he had been given all the details and the information he would have made a different decision.

Do you not think if he had been given all the information then the onus would have been totally on himself, but since that information was not provided to him, then part of the responsibility lies with the director?

Ms. Wychowanec: I cannot agree with you on that because the question was not put to the director, should he take the promotion? The question came from the employer. We have no idea what correspondence, what discussion or anything that went on was referenced to the selling, if you will, of the promotion to the employee.

I find it very difficult to accept that the employee would say some 16 years later: "If I had known all the facts about my pension, if I had known that the annuity value of my pension in the superannuation fund was \$791," or whatever it was that I told you, "and the value of it under the OMERS fund was \$825, and if I had taken that \$29.50 into account and projected it over my career path, I would have decided that I was much better off staying here, as a maintenance man rather taking the position of the supervisor."

Mr. Di Santo: Another way of putting what you say is that if he had received on December 14, 1966, the same information that he received one year later--in other words, if the director had said in the same letter: "If you transfer, only your contribution will be transferred and not the employer contribution, and your situation will be one, two, three"--then at that point, whether he had made a wrong or right judgement, it would have been his business, because in that case the onus would

have been on him only. But since that information was not provided, then some of the responsibility must be with the person who provided the information.

Ms. Wychowanec: I agree with you, but I underline that it is some of the responsibility.

Mr. Di Santo: Yes, some; I am not saying total responsibility.

Ms. Wychowanec: I think there is a shared responsibility in this whole issue. There is a responsibility on the employee to learn as much as he can about what is going on with respect to the promotion, what his duties were going to be in the new job and what it entails. There is some responsibility on the employer to advise the employee of the various options he has and to give him some good advice. There may be, and I am not sure to what degree there is, some responsibility on someone who is not directly involved in that to give some information.

But given the question that was asked, I feel the director did discharge the onus. He is not normally involved in these things.

Mr. Di Santo: I think we have to agree on one point, because it is factual. Mr. Bell pointed out to you that the advisability was not something that was raised by the employer; it was raised by the director of the pension fund. He took it upon himself to give that advice; therefore, he must have some responsibility for the consequences of the advice.

Mr. Sheppard: The question I wanted to ask was mentioned a minute ago: why would he come back 15 years later? That is what I cannot figure out.

Ms. Wychowanec: I have no idea why. First, there is an indication that OMERS had written to the man in 1978, telling him, "If you want to pick up all your past service, you are going to have to pay us another \$6,000." That happened in 1978. If I had received a letter telling me it was going to cost me \$6,500, I might have made some inquiries. The fact is that he did not go to the Ombudsman until three years later, which is an even longer delay.

Ms. Bohnen: Mr. Sheppard, this point will be addressed by Mrs. Boothby when she responds. We do not believe that there was this delay of so many years.

Mr. Sheppard: Is Mr. O still working for the county of Ontario or the region of Durham?

Ms. Wychowanec: I have no idea.

Mrs. Boothby: The regional municipality of Durham.

Mr. Sheppard: That is all for now, Mr. Chairman.

Mr. Van Horne: I found something in the letter which I

would like you to elaborate on. You indicated that there appears to be no authority which would allow the Public Service Superannuation Board or the Ministry of Government Services to make such an ex gratia payment. When you say "it appears," that seems to be a little bit grey or uncertain. Is that a fact, or--

Ms. Wychowanec: There is no authority for the superannuation board to make payment out of the fund for this type of payment. I cannot speak on behalf of the whole government; I am only speaking to it in terms of a payment out of the fund.

Mr. Van Horne: And there is no precedent for this, as far as you know?

Ms. Wychowanec: Out of the fund? No.

Mr. Van Horne: Thank you.

Mr. Chairman: There are a couple of questions that I would like to direct to Mrs. Boothby about the four letters which you say are the key to this whole matter.

You talked about advisability, about the director mentioning, in that last paragraph, the advisability of such a transfer. What we are hearing is that advisability, from the point of view of the director, is really dealing with whether there should be a transfer of the credits or a cash refund. That is really what they are suggesting or dealing with. How do you respond to that?

Mrs. Boothby: Yes, except that the county came straight back, repeating the same phrase, "Could you supply information with respect to the advisability of such a transfer," and prefaced it by the sentence that reads, "We do not want to do anything to affect his pension credits."

Mr. Chairman: Fine, but you have a letter from the director, dated December 14, which provides his advice, (a) and (b), and makes a recommendation. There was no follow-up letter.

If they were not satisfied at that point, why did the county not contact the director again and say, "Fine, thank you, but we also have some concerns about the employer's contribution, the future impact of the three-year system, and so on"?

Mrs. Boothby: Because the clerk-treasurer did not know. He did not realize it. That is what both he and the complainant have told me: "If only we had been told that the employer contributions would not be transferred." Having two options there implies that they are two different things. By using two different terms, cash refund and transfer of pension credit, the implication is that one has a--

Mr. Chairman: Why would you not specifically ask about those concerns? Is there not some responsibility, some onus on the individual, the employer? If they have those specific concerns, if they have had a letter, why can they not continue this

correspondence and say, "In terms of the advisability of them going from one job to another..."?

If this continued to be a concern, if they were not adequately answered, why did they not follow it up? I am still not satisfied.

Mrs. Boothby: The complainant assumed that--he has talked to me throughout about full 100 per cent portability. That has been his phrase. "I thought there was going to be 100 per cent portability." He thought his pension credits, the whole lot, would be transferred--as they are today, incidentally. That is as a result of a reciprocal agreement entered into a few years later.

Interjection.

Mrs. Boothby: The clerk-treasurer told me that, at this time, he was handling some of the big transfer of personnel. In 1968, the assessment personnel were transferred from municipalities to province. There was another big transfer of about 2,000 personnel in the outside administration of justice. He said he was involved in a picking-up service for general employees where the province paid the full employer contribution. He told me he assumed, from the letter, that the employer contributions would be transferred.

Ms. Wychowanec: Mr. Chairman, could I comment on that? I would point out to the committee that the conditions of the public service superannuation fund are all set out in a statute which is public knowledge. It is not as if you are dealing with a private fund, where you really do not know what is going on because you have not seen the agreement.

I am not suggesting that the clerk should have gone and read it, but, nevertheless, I think there is a general principle that you are supposed to know what the law is. If you say he totally did not know, I would have thought that if you were writing in and asking you would have said: "We really do not know what your plan is about and we do not know what the Ontario municipal employees retirement system is about. Could you fill us in and give us some further information?" That is not what was asked. The question was, "Can you transfer?"

Mr. Chairman: I can see the Ombudsman's concern here in letter C, where it says the county is considering promoting him but does not want to do anything that would affect his pension. That is fine; then you get the response. But I feel that if the county still was not satisfied with respect to the concern it expressed in letter C, there should have been some follow-up to that letter. That is my concern.

Mr. Cooke: The letter does not say anything about "some of the pension credits." It says, "Pension credits may be transferred." If I had received that letter I have would assumed that everything, including the employer's contributions, was going to be transferred.

Mr. Chairman: Do you want to respond to that?

Ms. Wychowanec: The only way I can respond to it is to repeat again that the fund is public knowledge, it is enshrined in a statute and it is not something that is a private agreement between an employer and the person who is providing you with the pension fund. What is permitted to be transferred under the act is going to be transferred.

Mr. Cooke: Why consult with the legislation when you have it from the director in writing?

Ms. Wychowanec: The director responded by saying, "Yes, you can transfer"; but implicit in that is, "You can transfer what is allowed to be transferred by the legislation."

Mr. Chairman: Mrs. Boothby, do you want to respond?

Mrs. Boothby: I have three very small points of information. First of all, regarding the date of complaint, the complainant complained when he knew what he had lost, and that was when he got the letter from OMERS advising about the conversion and saying he had only 41 months' credit.

He immediately went to his personnel department, which took it up. I have a big piece of correspondence on the efforts made by the personnel department both with the superannuation board and with OMERS. When none of that succeeded, the complainant came to the Ombudsman.

There is just one thing about all the changes that were made to the two pension plans since the complainant first became a contributor to the public service superannuation fund. It was the Ombudsman's position that none of those changes really affected the issue, which was the quality of the advice given to the complainant, that none of them need have taken place. It still left one with how these letters read and the advice they carried.

The last point is that the Ombudsman's recommendation on who should pay the compensation was that either the ministry or the board should pay. If the board lacks the authority to pay from the fund, the Ombudsman's recommendation covers the ministry.

Mr. Chairman: Are there any questions from the committee at this stage? Mr. Bell, do you have any additional questions?

Mr. Bell: No, Mr. Chairman.

Mr. Chairman: Ms. Wychowanec, do you have any concluding remarks to sum up your position?

Ms. Wychowanec: I have attempted to put forward the position of the board and the branch as carefully as I can. You have to keep in mind that this whole issue has to be looked at at the time the first inquiry came in. The first inquiry asked about the transferability of pension funds. The response was written to that particular question. There is nothing that enables us to determine now whether that was the deciding factor in whether or not the complainant took the promotion.

The two plans at that time were very similar. The difference, as I have indicated to you, appears to be a difference of \$29 and some cents per year at that time. Whether that would have been enough to make the complainant make a different choice is debatable.

It is very difficult to determine which career path the complainant would have taken in the intervening years. We have no idea whether he would have stayed with the county jail or gone out elsewhere, whether he would taken a job outside or inside the public service. We do not know what would have happened.

The fact remains, we do not know what is going to happen between now and the time he actually takes his retirement pension.

Given all this uncertainty, I feel the onus that is being placed on the director in responding to a letter, which had only one question in it and which was responded to, seems to be extraordinarily great.

Mr. Chairman: Thank you. Dr. Hill?

Dr. Hill: In considering this case, I tried to put myself in the shoes of this complainant in a reasonable manner.

This worker is offered a change in position, a change which his employer and he know might carry serious pension consequences. Acting like a concerned and reasonable employer, the clerk-treasurer writes to the director of the pension funds branch, an expert, for information about the pension consequences.

The director receives the request for informaton and offers to give advice about the advisability of the transfer. The advice is incomplete, because it does not state the disadvantages of the transfer.

I believe the complainant was entitled to full and complete advice. I further give credence to the statements of both the complainant and the employer that different arrangements would have been made had they known the entire story.

It seems to me that the pension board's case rests on the assumption that the complainant and the county employer had a better and more detailed knowledge of the two pension funds than is reasonable to expect or is borne out by these events.

In the upshot of these events, the complainant suffered a loss, a loss that would have been avoidable had he been fully informed. I believe the loss ought to be made up to him by those who occasioned it.

Mr. Chairman: Thank you very much. I guess that concludes--

Mr. Bell: No.

Mr. Chairman: Do you have something, Mr. Bell?

Mr. Bell: There is one small item involving the Ministry of Government Services.

Mr. Chairman: I was going to do that.

Mr. Bell: Oh, sorry. Go ahead.

Mr. Chairman: That is all for this particular case, and thank you.

Ms. Wychowanec: Are you going to raise the legislation?

Mr. Bell: Yes.

Ms. Wychowanec: Mr. Chairman, there is another item that I believe Mr. Bell wanted to raise, which affects the superannuation board indirectly. Do you want to have us retire and then come back in, or do you want us to remain?

Mr. Chairman: We had officials here from the Ministry of Government Services, did we not, to deal with it? Is this separate from the issue you are talking about?

Mr. Bell: No. It is the same.

Ms. Wychowanec: It is the same cast of characters.

Mr. Chairman: Please stay then. That is what we want to deal with next.

Mr. Bell: Permit me to give a brief introduction before we ask the appropriate representatives of either the board or the ministry to comment.

In your third report you recommended that there be an amendment to the Public Service Superannuation Act, eliminating restrictions on the re-employment of provincial superannuates--really ceilings on earnings. You carried forward in effect a recommendation of the Ombudsman in his second report.

12:20 p.m.

The ministry and the board accepted the recommendation, concurred in it, and advised the committee and the Ombudsman that such an amendment would be included in a package of amendments to be tabled in the House but that of necessity there would be a delay because at that time I believe the task force on pensions was in the middle of its study and had yet to release its report. That report has since been released and in your last report on page 20, you urge the ministry and the government to table the amendment as quickly as possible.

In the interim, there appears to have been a change in policy. Whereas the ministry was prepared to include this amendment in its package, it now seems, as a result of recent developments which I will have explained to you now, the ministry does not want to sew that into the act. Can you just take it from there?

Ms. Wychowanec: Mr. Chairman, the members of the Ministry of Government Services and I have appeared before this committee to address that issue of section 16 before, as you will see from the number of Hansard reports on it. We have looked at section 16, and our original recommendation was to make the amendment as requested by the Ombudsman, as recommended by the Ombudsman at that time.

When the amendments to the current Public Service Superannuation Amendment Act came before the Legislature this year in May, the question was again raised in the House as to whether or not an amendment to section 16 would be forthcoming. At this stage, all I can do is perhaps reiterate the response that was given by the Honourable Mr. Ashe at that time, if that is your desire. This is on page 1818 of Hansard, on May 25, 1984.

"Why did we not include changes to section 16 of the act? I never fail to keep the promise. We always keep the promise. I am not breaking it. The answer is a policy issue. Although the Ministry of Government Services administers the act and does all the work involved in it, we are not the policy ministry in that regard.

"I suggest that question should more properly be posed to my colleague, the Chairman of Management Board (Mr. McCague), who, I presume, will be passing on to a degree the views of the chairman of the Civil Service Commission. That is where the policy emanates. We are only the practitioners who carry the policy direction we receive into the practical administration of the act."

He goes on to say that the member can ask for a further explanation behind the answer. This is the part I would like to read again: "The decision was made, rightly or wrongly, that over the last number of years things have changed, times have changed, there is a much more definite issue of a policy nature involved, and this should be dealt with in a policy way in the total issue of mandatory retirement.

"To look at section 16 of this act in isolation would not be looking at the total issue of mandatory retirement. It has been put aside until that occurs."

That is essentially the issue. It is a question of mandatory retirement as a policy issue before cabinet. It has not been resolved, and when that is resolved, the issue of section 16 will also be resolved. At this point, I cannot give you an undertaking that section 16 will be amended in the near future or if it will be amended at all, because it is part of a different issue.

Mr. Bell: Ms. Bohnen, do you have something to say?

Ms. Bohnen: Well, I have seen correspondence, which I believe the committee has, from the chairman of the Civil Service Commission. It seems to take the matter one step further, and indicates that there is an intention not to amend the section, first, because of plans to do away with the mandatory retirement age, and second, because of unemployment.

I am not sure whether you intend to hear from the chairman of the Civil Service Commission on those points. You do not. Mr. Bell is shaking his head.

Mr. Bell: Not this time.

Ms. Bohnen: Leaving aside the issue of unemployment, it is not apparent to us why abolishing a mandatory retirement age, if that happens, solves the problem of re-employed superannuates. The problem we have is that people who have retired began to collect a pension. Then they were re-employed by the government, and because of the provisions of the legislation, have an earnings ceiling.

If you do away with the mandatory retirement age, it may have an impact on the number of people affected by this, but it does not do anything to take away the restriction on their earnings, as far as I can see.

Mr. Bell: All right. Right now we do not have no for an answer. Putting it at its highest level, I think we have a further postponement.

Ms. Bohnen: I do not have the letter with me.

Mr. Bell: Who is that letter directed to?

Ms. Bohnen: It is to me. I am sorry, I did not realize we would be doing this this morning.

Ms. Wychowanec: It is a letter from Mrs. McLellan of the Civil Service Commission. She is the chairman.

Ms. Bohnen: In talking about the issue she says: "It was felt that the intent of the Ombudsman's recommendation would be achieved in a more acceptable manner by the removal of the mandatory retirement age. Mandatory retirement is one of the issues that is being reviewed by the government prior to the coming into force of certain sections of the Charter of Rights in April 1985. It is anticipated that the problem you have raised will then be resolved."

I personally read this to mean there was no intention to amend section 16. Perhaps there is, perhaps there is not. I do not see how abolishing a mandatory retirement age resolves the problem. It may. Mrs. McLellan may be able to explain how it does, but from what she has said, I do not understand that it does.

Ms. Wychowanec: It does to this extent: if the mandatory retirement age limit is removed, a large number of people who are in superannuation come back to work because they want to work and because they want the money. If the mandatory retirement age limit is removed, they will not go on retirement in the first place.

Mr. Bell: What about those who have or do and then come back? I guess the question from a policy perspective is whether they should be faced with that limit?

Ms. Wychowanec: If the mandatory limit is removed, I do not know whether the policy will be that anyone who decides he is not ready to go on pension will then have the opportunity to come back in again, but I just do not know what the policy is going to be in that regard.

Mr. Bell: It is really more fundamental than that. We really are talking about whether the people are going to be allowed back in.

Ms. Wychowanec: I certainly am not in a position to discuss that or even to comment on it. I do not know what the answer is.

Mr. Bell: It makes the question of limit academic. If you cannot get back in, you are into another problem.

Mr. Lane: I do not know why we are discussing this. Cabinet has not decided.

Ms. Wychowanec: Absolutely not.

Mr. Lane: Why are we discussing it?

Ms. Wychowanec: We are speculating.

Mr. Lane: We are speculating on what cabinet may or may not do.

Mr. Bell: We are really trying to get a status report on a recommendation we made in a report many years ago.

Ms. Bohnen: I guess we are where we were then. We do not know.

Mr. Bell: Do you have any suggestions on what the committee might do or further consider?

Ms. Bohnen: We seem to read different things into Mrs. McLellan's letter. Perhaps she can give us some assistance on what it means. I am not sure which is the relevant ministry if it is not Government Services, but it might have something to add.

Ms. Wychowanec: Mr. Chairman, I have read to you what the minister said in the House and the position he takes with respect to his ministry. It is an administrative function. It is not a policy function and he is not commenting on the policy.

Ms. Bohnen: I do not know whose policy function it is off the top of my head.

Mr. Bell: He suggested the Chairman of Management Board of Cabinet.

Mr. Chairman: Is there anything else?

Mr. Bell: Not on this one. I guess we have to consider this.

Mr. Chairman: Okay. Thank you very much. We will break for lunch.

Dr. Hill: Mr. Chairman, at what time do we reconvene?

Mr. Chairman: At 2 o'clock. We will have Mr. Emmink before us and a representative of the Ministry of Education. We would then like to meet briefly with you and Mrs. Meslin in camera before the committee begins to deliberate some of the cases we have dealt with.

Ms. Bohnen: Mr. Chairman, did you deliberate on detailed summary 8?

Mr. Chairman: Yes. We are not supporting your position on that.

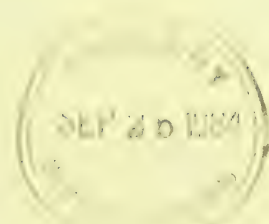
The committee recessed at 12:29 p.m.

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Government
Publications

SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
WEDNESDAY, SEPTEMBER 19, 1984
Afternoon sitting



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Catton, N., Assistant Director, Special Services
Hill, Dr. D. G., Ombudsman

From the Workers' Compensation Board:

Emmink, A., Assistant Secretary of the Board

From the Ministry of Education:

Waites, K., Education Officer, Curriculum Branch

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Wednesday, September 19, 1984

The committee resumed at 2:09 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: We will come to order, please. We have Mr. Emmink and Mr. Warrington here at our request to deal with recommendation 14 that was brought forward last week. I will ask Mr. Bell to remind the members what the matter dealt with.

Mr. Bell: Mr. Chairman, this centres on subsection 80(1) of the act and what the board's position is with respect to that section and whether it binds it by way of legal precedent or its own precedent.

To give you further background, one of the grounds of the Ombudsman's conclusions and basis of his recommendation was a reference to a body of Canadian law that defined scope of employment and the test to be applied. The Ombudsman referred the board to certain legal cases in his 22(3) report. Mr. Alexander at page 2 of his response, on page 33 of the material, said: "With regard to the legal precedents cited in Mr. McArdle's letter, the board is not persuaded that it ought to have decided otherwise on the facts of the case. Subsection 80(1) of the Workers' Compensation Act provides quite clearly that the board is not bound to follow strict legal precedent."

Then on Tuesday, September 11, in the afternoon, starting at page 25, we had some discussion with Mr. Emmink and Mr. Warrington. I am not going to read you the two and a half pages, but initially Mr. Emmink did confirm what Mr. Alexander said in his letter, and then at page 27, to try to put the matter into some context and really get on the record the reason Mr. Emmink and Mr. Warrington wanted to take this matter under further advisement with the board, I say:

"...there are two ways of interpreting that section. There is the Ontario Municipal Board way, if I can so call it, and perhaps the Ontario Labour Relations Board way, which says, 'We are not bound by our previous decisions. We are not going to handcuff ourselves to what we may have decided in a particular case...' That is one way to interpret it. The other way of interpreting it is...'We can disregard the law.'"

With that background, Mr. Emmink, do you have anything further for the committee now?

Mr. Emmink: Since last week's discussion on subsection 80(1), I have had an opportunity to talk to our counsel on the meaning of subsection 80(1), and as a result of that conversation I feel it is incumbent upon me to modify the stance that I took last week.

The discussion I had with our counsel suggested that the board will have regard for case law if it is presented before it. The board is of the view that subsection 80(1) of the act means that while it should have regard for such case law as may be presented, it should not consider itself bound by that case law, but, rather, should decide each case on its individual merits and justice.

What this means is that there may be a case which might succeed on the basis of case law, but which would fail because of the particular fact situation or the individual merits. The case of Mr. V, in detailed summary number 14, is such a case. The Ombudsman has identified certain case law which in his view suggests the claim should be allowed. However, the fact situation in Mr. V's case establishes that at the time of the accident he had completed his shift, he was no longer being paid, and he was no longer under the employer's supervision.

Thus, while it might be argued that the accident may have arisen out of the employment, the presumption in subsection 3(2) does not apply since the evidence establishes that it did not occur in the course of the employment. This is, in fact, a case where the contrary has been shown.

Just to summarize, the board does not take the position that subsection 80(1) gives it the right to act in total disregard of the law of the land, but, rather, the board takes the position that section 75 of the act gives it exclusive jurisdiction to determine matters that have been taken out of the jurisdiction of the court. I hope that will be of some assistance to the committee. If I can answer any questions to help you further, I would be happy to do so.

Mr. Bell: Back to Mr. Alexander's letter, page 2, and the phrase, "the...act provides quite clearly that the board is not bound to follow strict legal precedent." What it sounds like you have done today is reconfirm that.

Mr. Emmink: That is right. It has regard for it, but it does not feel bound by it, because what it feels bound by are the individual merits of the case. We are not going to act in total disregard of it.

Mr. Bell: How far does that take us? Let us not get into whether you are judicially reviewed and get direction from the--if you were judicially reviewed on a matter and got direction from the court, would the board feel compelled to follow that direction?

Mr. Emmink: Yes. The Welland Forge case is a good example of the interpretation of section 21. That was a case decided by the courts where the decision ran counter to what the board's policy and practice had been. In the light of that decision, the board modified its policy to conform with what the court had said.

Mr. Bell: I have no further questions.

Mr. Van Horne: Approaching it in another way, in the

summary 14 we received, the fourth point in the Ombudsman's reasoning is, "The case law in this area reveals that as long as the business purpose is reasonably incidental to the activities undertaken...he comes within the scope of his employment." I am not sure whether I understood what you just went through, but my understanding is that you have said this statement really does not apply.

Mr. Emmink: That is a statement of the general case law. The particular fact situation here is that this man had ended his shift. He was no longer under the company's pay and no longer under its supervision. We feel that this--

Mr. Van Horne: Do not get into that. You are simply saying you have not changed your mind.

Mr. Emmink: Yes.

Mr. Van Horne: In fact, you are saying that what he was about--returning his sheet to the dispatcher--is not in your opinion reasonably incidental to the activity of his job. That is really what you are saying.

Mr. Emmink: He was doing it after his job had ended.

Mr. Van Horne: Is it reasonably incidental or not?

Mr. Emmink: Not in our opinion.

Mr. Van Horne: I do not agree with you, but at least you have said something definite.

Mr. Chairman: Is there anything else from the members of the committee? Dr. Hill, do you have any comments to make?

Dr. Hill: We have no comment, Mr. Chairman.

Mr. Emmink: There is another matter?

Mr. Bell: No, we are finished with you.

Mr. Chairman: Is there another matter?

Mr. Emmink: Maybe I should just keep quiet.

Mr. Bell: There is another matter.

Mr. Emmink: I had thought that we were supposed to respond on that.

Mr. Bell: You are right; I am sorry. You are going to have to let me find it. Mrs. Catton, which of the cases in your--

Mrs. Catton: Summary 38 and the sixth report.

Mr. Bell: What page is that on in the appendices?

Mrs. Catton: That is in volume I.

2:20 p.m.

Mr. Bell: Yes. It is in appendix B, item 10. These are appendices of the Ombudsman referencing recommendations that are still outstanding. The reference is the Ombudsman's sixth report and his detailed summary number 38, which was dealt with by you in your 10th report and also in your 11th report.

You will recall that last week you received submissions and comments from the Ombudsman with respect to the latest decision of the appeal board panel, again denying the claim, and the committee's comments on that decision, which are contained in reports 10 and 11. Mr. Emmink asked you for an opportunity to consider those comments further before responding. He has correctly reminded me that he is expected now to respond. With that, would you put your response on the record to the committee? We can deliberate this at the appropriate time.

Mr. Emmink: Thank you, Mr. Bell, Mr. Chairman. Since last week I have asked the appeal board to have a look at Dr. Hill's statement concerning its decision of November 2, 1983. I indicated to them that the committee had asked for comments from the board in reply to that statement.

I discussed the matter with the panel members yesterday. They suggested I bring out a number of points for the committee's attention. First, Dr. Hill bases his opinion on the conclusiveness of Dr. C's evidence, on that doctor's response to two questions on page 32 of the transcript. The appeal board, however, based its opinion on all the evidence, as well as the manner in which it was presented. To be quite frank, the appeal board found Dr. C to be hesitant and an uncertain witness. His evidence was replete with qualified statements. In general, he gave the impression to that appeal board of a person who did not have firm opinions on the issue under discussion but who speculated on possibilities.

Given the entire body of evidence provided by Dr. C, the appeal board did not consider it appropriate for the Ombudsman to pick just one brief quote and to rely on that to conclude that Dr. C's evidence was equal in weight to that of the medical referee. In fairness to Dr. C, he was at somewhat of a disadvantage because of the passage of time. He did not see Mr. D, the complainant, until 1977, whereas the medical referee saw him in 1971, much closer to the actual events that are alleged to have precipitated the disability.

In comparing the opinions of Dr. C to that of the medical referee, the appeal board was satisfied that the medical referee was far more definitive when he stated in his initial report, and I will quote very briefly from it: "I would relate the post-traumatic neurosis to his underlying personality and tendency to overreaction and hypochondriasis rather than to any physical or psychological trauma suffered at the time of the accident."

He did not say it could be, might be or it is possible; he said he would relate it to that. Quite apart from the preceding, I think it is of some significance that in the memorandum submitted by the Ombudsman to this committee in 1982, the Ombudsman stated

the following: "It is, therefore, the Ombudsman's opinion that when the evidence of the neurologist and medical referee on the nexus between the post-traumatic neurotic condition and the accident is weighed against the evidence of the family doctor and the psychiatrist, the evidence is approximately equal in weight."

In other words, the evidence of the neurologist plus the medical referee is approximately equal to that of the family doctor plus Dr. C. At the hearing, in response to the question of the relationship of the post-traumatic neurosis to the accident, the family doctor said the following:

"The conclusion I can make based on my experience with Mr. D is that for 10 years he never saw me for any psychogenic problem before the accident, and certainly following the accident he did for many years and is still having problems. So his relationship as a patient to me changed at the time of accident. From then on, I was dealing with a multiplicity of pain problems and other symptoms that he never had before. I do not think my expertise goes beyond saying that."

Thus the only comment the family doctor feels qualified to make is to describe the change in Mr. D's condition after the accident. That such a change occurred is not in dispute. Accordingly, if the family doctor cannot comment on relationship, it appears the equation of evidence posed by the Ombudsman is now out of balance; that is, the evidence of the family doctor plus Dr. C formerly were approximately equal in weight to the evidence of the medical referee and the neurologist. Taking away the weight of evidence attributed to the opinion of the family doctor, the remaining weight of evidence can no longer be approximately equal.

Consequently, on the basis of the evidence relied upon by the Ombudsman, it would not appear that the benefit-of-doubt policy should apply.

Those are the only comments I have.

Mrs. Catton: Mr. Chairman, there are a couple of things I would like to comment on. First of all, the Ombudsman in his original report in 1977 relied upon the written evidence of Dr. C and Dr. B. In confirming his opinion through the years, he has relied on the further evidence given by Dr. C at the hearing in 1981. At no time, although it might have appeared so to Mr. Emmink, did the Ombudsman simply rely on those two short statements that appeared in Dr. Hill's opening statement to the committee as the basis of his entire opinion on this matter.

The second point I would like to make is that the neurologist referred to by Mr. Emmink, whose evidence, in addition to the evidence of the medical referee, apparently outweighs the evidence of the family doctor and of the psychiatrist who came by our office, saw the complainant in 1943. In his evidence, he gave no evidence as to the condition after the 1969 accident. His evidence spoke to whether or not the complainant suffered a personality disorder in 1943.

The evidence of the family doctor, it seems to me and to the

Ombudsman, is of equal weight that there was no evidence of a personality disorder immediately before the 1969 incident, as he had been the family physician from 1959 to 1969 and saw him on a total of four occasions. To use his words, "He certainly did not wear out my waiting room," so the diagnosis of hypochondriasis in 1943 does not seem to me to outweigh the evidence of the family physician.

The evidence of the psychiatrist, in our view, is equally conclusive. The medical referee did not undergo the scrutiny that Dr. C did at the subsequent appeal board hearing. The opinions are equally firm, and balance of probabilities of a benefit of doubt should be given to the complainant.

Mr. Di Santo: Mr. Chairman, I have just one question, because this bothers me a lot. We have a family doctor, who of course is not a specialist--and he says so--but he relates facts that cannot be changed. The facts are that this man, for 10 years before the accident, did not show any sort of mental disorder, and after the accident he had this type of problem. Of course, in your opinion that does not mean the accident was the cause of the psychological problems he was having.

We have many cases in which this situation is repeated. Are you really saying that the accident has nothing to do with this type of problem, that all at once, for reasons nobody knows, this person becomes crazy?

Mr. Emmink: I would not presume to make such a statement. In fact, that is the information given to the board by the medical referee.

Mr. Di Santo: You are not saying that. You are saying you cannot take into account the opinion of the family doctor because he has no expertise. I am asking you a specific question. Since the family doctor noted this change in personality, how can you say that the accident had nothing to do with it?

Mr. Emmink: I cannot say that.

Mr. Di Santo: Exactly. So that is where the benefit of the doubt comes into play. When you cannot say that you are faced with a situation that is (inaudible), in that case you have to rule in favour of the injured worker, unless you have clear evidence and not mathematical evidence. If you have two doctors who say one thing and one doctor who says another thing, then you rule in favour of the two doctors because they are two and the other is one. That is really a simplistic way of approaching problems that are very complex.

2:30 p.m.

Mr. Emmink: With respect, sir, it was not the board that advanced that particular mathematical approach; it was the Ombudsman who advanced it. The board said that the weight of Dr. C plus the family doctor was equal to the weight of the medical referee plus the neurologist.

Mr. Di Santo: Exactly.

Mr. Emmink: All the board is saying is, if that is so and if that is accepted, then if you take away the weight of the family doctor, you are left with less weight.

Mr. Di Santo: I think that you are reducing the weight to a mathematical equation, because if I understand what the Ombudsman is saying, he is saying, "We have two bodies of opinion and they are almost of the same weight." You are saying: "No. Since the family doctor is a family doctor and we do not accept his opinion, then we have two doctors on one side and one doctor on the other side, and we accept the opinion of the two doctors." I suggest that is the wrong way of approaching the problem.

Mr. Emmink: We are not saying that we are not accepting the family doctor's opinion. It was the family doctor himself who said he felt he was not qualified to comment on the relationship.

Mr. Di Santo: No, he did not say that.

Mr. MacQuarrie: Yes, he did.

Mr. Di Santo: He said, "I have no expertise in diagnosing his mental disorders." But he said he noticed a change in personality after the accident because "I have seen this man for 14 years," which is different.

Mr. Bell: Mr. Chairman, let me assist by giving the committee some further context for these comments. You made a recommendation in your 10th report that the board reconvene a hearing on this matter and consider evidence of the complainant's family physician and psychiatrist and, after receiving that evidence, decide whether the benefit of the doubt should be applied.

The board did reconvene a hearing. It did hear from the two physicians personally. It made certain comments in its decision respecting that evidence. It described the psychiatrist's opinions as speculative and inconclusive, and then decided that the policy of benefit of the doubt did not apply to this case.

What you said in your last report at page 12 is this: "The board arrived at this decision notwithstanding that it appears that the only medical evidence it considered first hand was from the complainant's physicians who in varying degrees expressed the opinion that the industrial accident in question contributed to the post-traumatic disability. The board does not appear to have heard or considered any viva voce testimony from any other medical expert that the industrial accident did not cause in any way the post-traumatic symptoms."

That is one observation you have made.

"The committee wishes to receive the comments of the Ombudsman before it comes to any final conclusions."

Here is your second comment:

"However, it does seem to the committee at this point that the board is not applying the doctrine of benefit of the doubt as intended. From the brief summary of the evidence as set out in the board's decision, it appears that a classic case for the application of the policy has been made."

Mr. Emmink, do you believe that the comments you made earlier adequately address the two comments that the board made in its last report, which I have just read?

Mr. Emmink: My comments were designed to respond to the Ombudsman's statement, Mr. Bell.

Mr. Bell: Fair enough. Is there anything additional you wish to add with respect to the committee's comments, which essentially are that you disregarded the evidence of two flesh-and-blood witnesses and preferred the evidence of somebody who never appeared before the board.

Mr. Emmink: I suppose the only thing I could say was that the committee's recommendation as to what it wanted the board to do is quite specific, and that was to hear first-hand evidence from the psychiatrist retained by the Ombudsman and the family physician. The committee did not tell the board to hear first-hand evidence from the medical referee. I sort of wonder if the board can be criticized now, in retrospect, for not doing that when the committee did not direct it to do so.

Mr. Bell: I am not suggesting any criticism. That is all, sir.

Mr. Chairman: Is there anything else from members of the committee? Mrs. Catton, do you want to say something?

Mrs. Catton: Simply that the board did offer the medical referee an opportunity to appear before it at the same time as Dr. C appeared. The medical referee declined to accept that offer. Just if that helps the committee.

Mr. Chairman: Okay. Fine. Thanks very much.

Mr. Waites, would you like to come forward please? This is tab A(a)3 in volume I. Would you identify yourself for purposes of the record.

Mr. Waites: Yes, I am Keith Waites and I work for the Ministry of Education in the curriculum branch.

Mr. Bell: Members of the committee, if you turn to A(a)3 in your first volume, you will see that what is included there is page 19 of your 11th report dealing with this matter with the Ministry of Education. Accompanying that page is a letter from Mr. Waites to me, dated September 7 last. This matter has been around longer than the one we last discussed with the Workers' Compensation Board. It goes back to your third report in 1977.

At that time, you accepted a recommendation of the Ombudsman that there be insurance coverage available for students to

compensate them adequately for injuries sustained in the case of a pure accident, i.e., without fault, as a result of participation in shop classes and organized athletic activities.

This whole matter started when the Ombudsman investigated a circumstance where I believe a young boy injured his hand in a shop class in one of the pieces of equipment. As a result, he suffered a diminution in earning capacity. I think the realistic expectation was that the person would be involved in some form of manual labour or labour that required full use of both arms, and he was deprived of that as a result of the accident.

Mr. Maloney concluded the current insurance, which is available only on a voluntary basis, does not adequately compensate, so he thought that was necessary. You have, since your third report, agreed with him. Every year representatives from the Ministry of Education appear before you and tell you about the progress of their discussions. Last time, I do not think I am stretching things to say you believed enough was enough. So you made recommendation 3, as you find it, that the ministry implement the recommendation that is referred to and do it by means of a policy of insurance on a province-wide basis before the end of this year.

With that introduction, Mr. Waites, and with the benefit of your letter to me earlier this month, could you advise the committee what the ministry's position is with respect to this recommendation; i.e., is it going to be implemented and, if so, when?

Mr. Waites: I am really not in a position to give a clear, concise answer as to exactly when it is going to be implemented. I can give you a progress report on recent activities and also I hope, if I can beg your indulgence, to get further clarification from the committee as to the specifics of the kind of policy you would see.

2:40 p.m.

Last year, you may remember, I joined another chap in the ministry, Alec McCuaig and gave you an update on the workers' compensation coverage for, as we term them, work-education students. These are co-operative education and work experience students. That program has been in operation for one year and is working well. However, that covers students when they are out in the community. It does not cover them when they are in the traditional school setting.

You may recall that last fall we mentioned we were going to have meetings with the Ontario School Trustees' Council and the Ontario Secondary School Teachers' Federation. Those meetings took place and, although I was not involved in this particular project at the time, those two groups expressed an interest in the proposal and reserved the right to add comments and make suggestions when the specifics of the program were developed.

One of the stumbling blocks in implementing this program is the fact that we have not had specific data available that would

give the risk hours in the categories you cited, i.e, shop classes and organized athletic activities. Those were data that were simply not available this spring. Our statistics people mounted a project and we are now in a position to supply the insurance people with estimated data of the number of risk hours.

I became involved with this project in June when our deputy minister Dr. Harry Fisher gave direction that this item should be moved along and resolved. That is really how I got here today.

The chap who developed the statistical package, Joel Clodman, in the research and information branch, and I met with Mr. Charles Black, who is vice-president, health insurance, of the Canadian Life and Health Insurance Association, on August 10. We met with Mr. Black for two purposes--to discuss generally what our problem was and to get his guidance and advice as to whether any similar policies existed in other provinces or in the United States, and also to get his general recommendations as to how we should proceed.

He suggested at that time that we should make contact with several of the insurance consulting firms. We had a meeting with a company last Thursday, September 13. I was not really aware of the services provided by this type of firm before, but essentially it will design the policy the client wants. They will invite tenders from the insurance companies they know will be competent to provide proper claim service and so on.

They will negotiate with those insurance carriers for the most favourable terms and best possible price, advise the client on the comparative value of the alternative bids and provide an ongoing service in claim settlement, and through the years generally to advise and manage the policy. I had a very useful meeting last week with the company involved.

The next step in the process is to try to clarify the details of the policy that is desirable. I thought it might be helpful if you could give me a few minutes today to discuss my views on what we are trying to secure and see if it meets with your agreement.

In general, I think we are after a province-wide mandatory accident insurance policy that would cover students in the publicly supported elementary and secondary schools of Ontario when they are injured while they are participating in shop classes and organized athletic activities.

With shop classes, I think it is important to define what we mean. At the elementary school level we are really talking about industrial arts facilities. At the secondary school level, I think shops would be defined as the facilities within the technological studies program. That would include drafting classes or shops, if you will, as well as the more traditional one of auto shops, etc.

The organized athletic activities at the elementary school level would consist essentially of the mandatory physical education program--some 80 hours now is required--plus the intramural and interschool sports at the elementary school level.

It might be important at this point to define what I would not see it as including, and that is recess and activities before school. That is not in our understanding of your desires.

At the secondary school level we are talking about organized athletic activities--intramural and interschool--and the athletic component of the physical, health and education courses.

The coverage would be for full- and part-time students during the regular school year and in the summer, day or evening, when participating in the above with teacher supervision. In other words, it would not cover students who decided to have a touch football game on a Sunday afternoon behind the school. I guess this is really our definition of "organized." Another way of saying that is that it is part of the school program and supervised by a teacher.

Mr. Van Horne: I have a series of questions on the last few points made by Mr. Waites, if I may.

Mr. Chairman: Are you finished, Mr. Waites?

Mr. Waites: No, there is more; but if the chairman wishes, we can entertain questions now and then go on.

Mr. Chairman: Fine, then. Mr. Van Horne?

Mr. Van Horne: I would like you to explain to us why you have not considered including activities such as those that go on in science classes wherein there is apparatus as dangerous as, if not more dangerous than, that in some shop areas. Certainly a drafting class does not have the chemicals, the Bunsen burners, etc. that you have in a science class. So I would suggest that your definition of areas within the school setting is not adequate. I could throw in other areas. Home economics has microwave ovens, stoves, irons, sewing machines and a variety of other things that could all lead to some form of accident. That is my first point.

The second point in so far as time is concerned is that if you have an intramural program in either an elementary or secondary school you will find activities at recess, at noon hour or before or after school. In any of the schools I am aware of in my community, be they public schools or separate schools, this sort of thing goes on. So I would say that your time definition is too narrow; that is, you cannot exclude the noon hour or the preschool or post-school times.

You also suggested that they be only activities that are supervised by teachers, and we all know that stringent policies are being implemented through school boards that bring in volunteers--parents, university students or others--to assist with coaching and with various activities. It does not have to be athletic; it could be some other activity. To submit that it be an activity that has a teacher supervisor, I would say again, is too narrow a definition given the conditions we have in 1984.

The areas, the times and the conditions you have defined with respect to supervision, I would say, are all too narrow. I would like to get your reaction to that.

2:50 p.m.

Mr. Waites: I appreciate your comments. We could make the definition much broader. My hesitation in doing that is that obviously the more we include, the more expensive it is going to become and the more difficult to implement. I certainly am sympathetic to your views and appreciate your comments.

We did consider some of these areas. It is a question of how far you try to go in the initial program. We tried to meet the request of the Ombudsman in terms of the specific language at the time, but it is a matter of how far we should broaden that at the time of implementation. It is very useful for me to come today and to talk with you about the specifics.

As to whether we might be able possibly to invite bids on the basic package plus these other additions, it could be there would not be that much difference. I do not know. A lot also depends on the cost of the insurance program on the administration end of it. Since it is presumably going to be a universal thing, we will not cause the insurance companies to incur a lot of expenses in terms of looking at options, individuals who have opted in and those who have not and so on.

I am told in the basic accident insurance policy that is sold now in the school system the price tag is something like \$3, and there is about \$1 worth of insurance in it and about \$2 worth of administration. I found that to be an interesting comment. I will certainly make note of your suggestions and consider those in our policy design.

Some of the benefits we are conjecturing should be included. The basic purpose of those benefits was to provide medical costs not covered by the Ontario health insurance plan, and I suppose there could be some limitations on that. There usually are in some insurance policies: dental care, home care support costs required because of the disability, transportation required for medical treatment or rehabilitation, and in the case of severe permanent disability, some substantial payment to compensate the student for loss of income.

Presumably this is something that would begin at the time, or the payment would be made at the time when students would normally be expected to proceed to work, whether the magic number is age 18 or something in that area.

When one talks about adequate compensation, there is always a great range of opinion as to what is really adequate. It relates to the degree of disability. If one could assume 100 per cent disability, I am not really sure, in my own mind, what is adequate compensation.

One difficulty we have had through the years with the insurance companies is that although the ideal plan would provide

a life support system, something like the workers' compensation payments, we have not been able to identify any interest in insurance companies in getting involved in that type of policy. Apparently, Lloyds of London will not underwrite any policy with more than a five-year payment schedule.

The other possible option is a lump sum at age 18. Whether the money would be reinvested in some annuity or whatever, I do not know, but these are some of the things we will have to look into. I do not know what kind of lump sum would be required to provide that kind of annuity.

The minimum payment for workers' compensation, even for part-time workers with total disability, is something like \$8,000 a year. I think it scales up from there to about \$19,000 or \$20,000. I do not know what the maximum is, but we would have to make some judgement call as to what annual income might be adequate. I do not know whether the committee might have some suggestion as to what figure should be used if we end up with a lump sum payment.

These are some of the decisions that will have to be made before the policy can actually be written and we go out to the field to obtain tenders. It is my hope at this time in the next two or three months to be into that stage.

Mr. MacQuarrie: I will start at the last first and work back. We are talking about compensation and amount of compensation. The present coverage is available on an optional basis to students, and I think the Insurance Company of North America was the carrier of the program at the time.

Mr. Waites: I believe there is more than one carrier involved.

Mr. MacQuarrie: It was my impression that there was a scale of benefits there depending on the nature of the injury. I forget what the maximum payable under the program was. Do you recall offhand?

Mr. Waites: No, I do not have that one. I do have before me a policy that was written for the Canadian Interuniversity Athletic Union. It was given to me by the consultants that we had the meeting with last Thursday. I guess the maximum payout there is about \$50,000. Loss of entire sight of both eyes is \$50,000, and both hands or whatever, or a quadriplegic, is \$50,000. The price for that is really cost per player, and it relates to the type of sports activity. I guess ice hockey and football are around the \$27 per person range.

Mr. MacQuarrie: There are a number of aspects about this that trouble me. The athletic endeavours you mentioned, particularly hockey and football, tend to be very high-risk sports in terms of personal injury, teeth being one of the common things to go, and other injuries arising out of accidents.

I can recall a case that happened a few years ago where there was a fight on the field of play. That happened to be a

basketball court. The kid got his nose smashed in pieces and a couple of teeth knocked awry. In that case, an assault charge was laid and a finding of guilty handed down. Who is liable in a case such as that? Should it be the coaches or the board involved, or should the assailant in one way or another be responsible? These are things that rather trouble me when you are trying to assess the nature of the risk that you are trying to insure.

Getting back to a point made by Mr. Van Horne, as one who spent considerable hours in laboratories, a chemistry laboratory can be as dangerous a spot as you want to place the student. It not only depends on the chemicals being used but also varies from school to school in this province, some schools having far better laboratory facilities than others; they are more up to date and have safer installations, particularly the oxygen and the butane supplies for Bunsen burners and the rest of it. They are far better handled in one institution than another simply because of age.

3 p.m.

All of this leaves quite a conundrum of how best to approach it. I can understand the problems you are encountering, and possibly the delays that have occurred in bringing about an effective, all-embracing policy. As you pointed out, it has come to the point where you want to get the most comprehensive coverage possible at the lowest or most reasonable cost.

When it comes to compensation for loss of earning ability and earning capacity, from my experience in other fields it is very difficult to assess that with high school students in particular. I have seen a person who was handicapped as a result of an accident at school go on to do quite well in life.

Looking at it against the background of some of my own experience, I think a lump sum settlement payable in trust at the time the accident occurs is best. It is a question of picking what would be an appropriate lump sum.

That is a combination of questions and observations.

Ms. Bohnen: I note that the committee's 10th report recorded that the ministry had been considering a mandatory province-wide policy for students in all work-related situations, including school-sponsored or school-related transportation and co-op work place situations. They had a preliminary cost estimate of \$4 million. At that point there seemed to be consideration of something broader than shop classes and organized athletic events.

I gather from what we have heard today that the statistics generated in the ministry that will be the basis of discussion with the insurance industry relate just to the shop and athletic events. I can see that if the ministry has to go back as we have been suggesting and consider the risk for other school activities, it is not going to speed up the process. It still seems to be a good thing to do. While they are considering the issue at all, I think a comprehensive policy for all kinds of risks should be considered and at some point in the future there will be some concrete developments. It is taking a while; that is all.

Mr. Chairman: I do not think we have to pursue this any further unless Mr. Waites wants to add something at this point.

Mr. Waites: I do not think I can add any more at this point. If you come to some decisions or have some suggestions about areas other than the specific ones--it guess it is take what we have, plus adding science and other activities at the elementary school level, or go totally all the way. That is really how we got to the \$4-million figure. The position of the insurance company I guess, with the lack of data we had at the time, was: "We are not really interested in selecting the high risk areas in the school system. We would rather write a comprehensive policy."

Mr. Van Horne: Do not overlook the issue of supervision. I think that is a key issue.

Mr. Waites: I think we could certainly accept a volunteer as an agent of the teacher, if you will. However, if on Sunday afternoon students take off and want to play football and someone is injured, I think that is an uncontrolled situation we cannot help with or hope to cover.

Mr. Van Horne: You find a person in grade 12 supervising a noon-hour junior or grade 9 basketball, volleyball or touch football activity in the school. That happens.

Mr. Waites: But at least on school grounds, I guess, during regular school hours. Interesting questions, yes.

Mr. Van Horne: The room has brightened considerably, Mr. Chairman. I do not know if we are all caught in the presence of Mr. Lawlor.

Mr. Chairman: Mr. Sheppard, did you have a question?

Mr. Sheppard: Can you not get different kinds of insurance? If you pay \$5 per student on September 1, does that not cover the student 24 hours a day?

Mr. Waites: It does, but with very limited coverage. You are not going to get a life-support system. If you are a quadriplegic, you might get a lump sum of \$25,000. It depends on the kind of settlement.

Mr. Sheppard: I think there are different kinds of insurance. I remember when we had three children in high school and one in elementary, we had a blanket insurance coverage on them. The two boys were very active in basketball and football. As you know, football is a pretty rough game. We got all the insurance we could to cover them. Mind you, we were lucky. We did not have any fatalities. You said \$3. I was just wondering why you did not mention the \$5 insurance scheme they used to have. Maybe they do not have it now. I do not know.

Mr. Waites: Whatever the figure, I think the real problem is the settlement you get if you lose your left arm. I would not see it is as acceptable and I do not think this committee would either.

Mr. Sheppard: We will decide later what will be acceptable.

Mr. Waites: If you are happy with the \$5 policy, that is all out there now. All we have to do is tell the school boards it must be mandatory. It would be very easy to implement that, but I do not think it would satisfy the need.

Mr. Sheppard: Well, \$25,000 is not enough for a finger or a limb. That is quite true. I think if our students are going to play sports, we should try to cover them with some insurance to protect the family if something does happen to them.

Mr. Waites: There is another company that sells team insurance, Continental, to be specific. The price for the whole team, if we relate it to a hockey team 13 to 17 years of age, they will sell you insurance for the whole team for \$56 for the season.

Mr. Bell: Does it have (inaudible)?

Mr. Waites: The total payout there is \$3,500.

Mr. Sheppard: What about the basketball teams or the volleyball teams girls play on? I think if you are going to have insurance policies you should have an insurance policy that each student can buy that covers him or her during the sport being played, or have a blanket insurance policy that covers students while they are at school from nine o'clock until they leave.

Mr. Waites: I think that is obtainable. I guess it is just a matter of trying to settle on what limits, in terms of payments, are reasonable, because \$3,500 is not going to buy you very much.

Mr. Sheppard: No, I guess not.

Mr. MacQuarrie: We could subsidize it another way, I suppose.

Mr. Waites: In terms of funding, I assume the ministry would look upon the usual sharing arrangement we have with the local school boards.

Mr. Chairman: Which is?

Mr. Waites: Basically, we pay a percentage and they pay a percentage of the cost of education. I guess if we recognize ordinary expenditure at the secondary school level now, we recognize about \$3,174. In a school board of average wealth, we now pay about 48 per cent of that.

Mr. Chairman: Just to clarify it in my mind, if we are talking about implementing a policy such as this for all students in these various areas, who would be paying the premiums?

Mr. Cooke: More than half would come from property taxes.

Mr. Waites: That is something yet to be settled, but I assume we would look for some sharing with the local school boards.

Mr. Chairman: You are not presuming the parents of these children would be paying anything?

Mr. Waites: That is one of the options. That is a decision that has not yet been made. I think it would be difficult though, in some respects when education is supposed to be free, to insist that parents must pay substantial premiums to insurance companies if their children want to participate in the normal school program.

Mr. Bell: That would be the first time I have ever heard education described as "free."

Mr. Waites: Without tuition fees.

Mr. Chairman: I am one of those people who has problems with universality and it would apply to that sort of thing too.

Mr. Cooke: We could hire 100 bureaucrats to administer a means test.

Mr. Chairman: I do not think there is anything further we have to pursue in this matter. Thank you.

We are going to move in camera to deliberate. Before we do, we had a request from Mr. Di Santo. We had an understanding we would be dealing with the workers' compensation cases this afternoon. We have only about 45 minutes. He had a conflict of schedule. I wonder if we should not deal with the case we heard this morning and leave the Workers' Compensation Board cases until tomorrow morning. Does that present anyone with a problem?

Mr. Hodgson: No problem with me. I cannot be here.

Mr. Chairman: How do other members feel? We will not have adequate time to get into them in any event. We could deal with the case we heard this morning in the time left. I do not think we will be able to resolve these rather tough cases. We may resolve one at best.

Mr. MacQuarrie: I agree with the scheduling as far as we can to accommodate all members of the committee, but by accommodating one, you are disaccommodating another.

Mr. Cooke: The chairman said we will not get through the workers' compensation cases this afternoon in any case.

Mr. MacQuarrie: We could start.

Mr. Chairman: We seem to have a split in the committee. My view is that we could deal with the case we heard this morning and hopefully resolve it. Agreed?

We will adjourn the public portion of the meeting and move in camera. I would ask all those who have not been requested to be present if they could move from the room, unless you feel it is important.

The committee continued in camera at 3:14 p.m.

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SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
MONDAY, SEPTEMBER 24, 1984



SELECT COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Runciman, R. W. (Leeds PC)
Breithaupt, J. R. (Kitchener L)
Cooke, D. S. (Windsor-Riverside NDP)
Di Santo, O. (Downsview NDP)
Eakins, J. F. (Victoria-Haliburton L)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Lane, J. G. (Algoma-Manitoulin PC)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Sheppard, H. N. (Northumberland PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon
Madisso, M., Research Officer, Legislative Research Service

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations
Zacks, M., Director, Legal Services

From the Ministry of Consumer and Commercial Relations:

Simpson, B., Executive Director, Business Practices Division

Witness:

Campbell, B., Counsel, Housing and Urban Development Association;
with Bogart, Russell, Campbell and Robertson

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON THE OMBUDSMAN

Monday, September 24, 1984

The committee met at 2:26 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(continued)

Mr. Chairman: I think at the outset it would be appropriate to indicate the committee's feelings on the passing of the first Ontario Ombudsman, Mr. Arthur Maloney. I know we all share with his family and friends and people who have worked with Mr. Maloney over the years the sadness of his passing.

A number of us who attended the Vancouver conference last year had the opportunity, if we had not had before, to meet Mr. Maloney and get to know him a little better. I served on a panel with him, and he was certainly an individual who served his province and his country exceedingly well over the term of his life.

John Bell has served as counsel to this committee since its inception and also, of course, worked with Mr. Maloney. John, I think it might be appropriate if you would like to say a few words.

Mr. Bell: Thank you, Mr. Chairman. Bill Hodgson and I go back the longest with this committee and with Arthur Maloney. I share the loss that many people have expressed in the last few days. Only history will tell what a profound effect and influence Mr. Maloney had on the concept of an Ombudsman, not only in Ontario but in Canada and probably in all Commonwealth jurisdictions.

He was committed to a concept when he took the office, and I think most people would concede that he fulfilled his goal in putting in place one of the finer, if not the finest, operations of its kind in the world. We did not always agree, but we all certainly knew where the other stood, and I think the other fairly respected the points of view of all concerned on those differences.

Speaking as a lawyer and as one who recalls in law school sneaking out of classes at Osgoode Hall and going over to the courthouse to see those jury addresses, I would say the legal profession has certainly lost an eloquent barrister.

I will not presume to speak on behalf of Mr. Hodgson, but going back to the very beginning of this committee and watching the office grow with Mr. Maloney's efforts, I share the loss and give all those concerned my condolences.

Mr. Breithaupt: Mr. Chairman, perhaps you would be good enough, on our behalf, to write to Mrs. Maloney and express the condolences of all members of the committee.

I recall particularly that day when Arthur explained to the Board of Internal Economy his views as to disclosure of various items in his office. It was one of the more interesting experiences in my life and certainly one I will never forget. The event clearly brought out the Irish in Mr. Maloney and it was a tour de force that those of us who sat through it on that most interesting afternoon will always remember.

2:30 p.m.

Over the years I got to know Arthur Maloney somewhat in a variety of activities. Certainly his position as one of Canada's pre-eminent legal counsel will not soon be surpassed.

Accordingly, Mr. Chairman, I would suggest that a letter of condolence go from you, if that would be appropriate, so that his wife and family will once again have underlined for them the immense stature of their late husband and father that touched us in many important ways in our society in Ontario.

Mr. Hodgson: Mr. Chairman, I would reiterate what both John and Jim have said. I can remember Mr. Maloney being at that Vancouver conference, although the man was in failing health, and the great interest he showed. He never let up all the time he was there, even though he was in very poor health. I have nothing but respect for the late Arthur Maloney.

Mr. Chairman: Thank you very much.

Our first order of business on the agenda today is the response from governmental organization to the recommendations in the committee's 11th report. We are going to be dealing initially with the Ministry of Consumer and Commercial Relations' Housing and Urban Development Association of Canada case, which is A(a)2 in your binders. For the purposes of the record, I wonder if you two gentlemen could identify yourselves, please.

Mr. Campbell: My name is Brian Campbell, and I am the solicitor for the warranty program.

Mr. Simpson: My name is Bob Simpson, and I am with the Ministry of Consumer and Commercial Relations.

Mr. Chairman: Mr. Campbell, I understand you have something to say at the outset.

Mr. Campbell: The warranty program, of course, has received the recommendations of this committee made subsequent to considering this matter last year. For the record, the warranty program, notwithstanding the recommendations that have been made by the committee, is in and of itself prepared to pay to the claimant the balance of the moneys that he made a claim for against the warranty program.

In other words, last year the program was prepared to and did pay to the claimant \$5,000 on an ex gratia basis and explained why that was. It rejected and does reject the recommendation of the committee to pay the balance of the money for the reasons that the committee feels they should be paid.

The warranty program is going to pay the money, and the explanation for that is to be found in the proceedings before the Commercial Registration Appeal Tribunal. At that time, the decision of the program, which was appealed, was that the program would pay \$5,000--that this was a valid deposit--but that the rest of the moneys being characterized as a deposit was not properly so characterized.

At the hearing before the tribunal, the tribunal was of the opposite opinion based on the evidence; that is, they thought that the moneys so paid by the claimant should be characterized as deposit moneys and so found. On other grounds, to do with the interpretation of the regulations, they ruled that the warranty program need pay no money, and at that point the Ombudsman's office became involved.

Taking it back to the decision of the Commercial Registration Appeal Tribunal, the program will adhere to the decision that characterized the moneys as deposit moneys, and for that reason will now pay to the claimant the balance of the moneys he is entitled to under the provisions of the act and regulations.

Having said that, I would like to put on the record the fact that the warranty program feels no legal obligation to pay the claimant under the legislation, and it feels that there is no obligation to accede to any recommendation made by the committee of the Ombudsman. Lastly, the program does not feel that it is financially responsible for decisions of the Commercial Registration Appeal Tribunal made in their favour.

Having said that, there may be some point to the fact that, as between the claimant and the warranty program, it may be that the program can bear the disposition of the Commercial Registration Appeal Tribunal from a financial point of view better than the claimant.

It has always been the program's position that the proper avenue for appealing a decision of the Commercial Registration Appeal Tribunal is to the Divisional Court. The claimant did not avail himself of that opportunity and, because the program was successful before the tribunal, the program did not avail itself of that opportunity. That opportunity, of course, is now past.

For the record, the program has made a decision that, had it had the opportunity to appeal the finding of fact of the Commercial Registration Appeal Tribunal, it probably would not have done that. That being the case, it is prepared on the basis of finding of that tribunal to pay the claimant's claim.

Mr. Chairman: Thank you, Mr. Campbell. Ms. Bohnen or Mr. Zacks, would you like to say anything at this point?

Mr. Zacks: I believe there were two recommendations--

Mr. Bell: Can we deal with the money recommendation now, if we might? We can speak to Mr. Simpson about the--

Mr. Zacks: We are certainly pleased on behalf of the complainant that the program has decided to pay the money. We are wondering whether it will also pay him a year's interest.

Those are my comments.

Mr. Bell: Is your tongue firmly planted in your cheek, Mr. Zacks?

Mr. Zacks: I know the position the committee takes on interest, but I just thought I would raise it.

Mr. Bell: Thank you, Mr. Campbell. You have shortened discussions today.

Mr. Mitchell: We can go home early then.

Mr. Bell: May I commend you and your client for that. I do not think it would serve anybody that well if we got into any esoteric or philosophic discussion on obligations to committee recommendations or what. That step is to be commended.

Members of the committee, I have nothing further of Mr. Campbell or of the HUDAC people, unless you do. There is the other recommendation dealing with amendments to the regulations which I want to ask Mr. Simpson to comment on, because from what Mr. Simpson has indicated to me in preparation for today and as referenced in some of the material before you, that recommendation has also been implemented.

Can you comment, Mr. Simpson?

Mr. Simpson: I cannot add anything more to that. The precise recommendation has been implemented,.

Mr. Bell: Can we just test that for a moment? Either of you may comment.

I think we are here today and we were here last year because the Commercial Registration Appeal Tribunal, on an interpretation of the act or the regulations, felt compelled to deny this person's claim, substantially because he had acquired the property.

If we were given the same circumstances today with the amendment--I do not want to prejudge every application, but is it fair to say that the interpretation that CRAT felt compelled to follow would no longer exist, and if they so chose they could rely upon the amendment to grant entitlement, all other things being equal?

Mr. Campbell: Perhaps I could respond to that, Mr. Bell.

The particular subsection of the regulation that was under consideration last time was subsection 6(1) and the particular words that were of concern were in the situation where a purchaser who does not become an owner can become entitled to a deposit refund. In the amendment to the regulation which became effective on February 8 this year, the language was changed to eliminate the

requirement, as it read in the regulations, that a purchaser need remain a non-owner before he could be entitled to a claim under clause 14(1)(a).

2:40 p.m.

I can assure this committee that if a purchaser under a similar fact situation to the one of the claimant to the select committee were to make a claim now, then there would be no decision, either by the Commercial Registration Appeal Tribunal or the warranty program, that would be made under the same logic as was the last decision.

Mr. Bell: In other words, acquiring title to the property will not now disentitle a person to claim or be awarded compensation under the act, if it ever did.

Mr. Campbell: That is correct.

Mr. Bell: I have no further questions of either Mr. Simpson or Mr. Campbell.

Mr. Chairman: Mr. Zacks, do you have anything?

Mr. Zacks: No. I think the amendment satisfies the recommendation.

Mr. Chairman: Do any members of the committee have anything to say at this point?

Mr. MacQuarrie: Some of my constituents were involved in the same sort of situation--bankrupt builder, half-finished houses, some occupied.

Mr. Bell: Would the members of the committee just flip to tab 1 while we are in public, the same volume 1. Just turn to the first item 1 you can find.

You will recall that this is a recommendation for an amendment which you originally indicated ought to be set out in the Financial Administration Act. This amendment would give the Ombudsman the ability to make a recommendation for a money payment, if there is any doubt that he cannot now. It contemplates a process whereby, if that recommendation is accepted by the governmental organization, the acceptance in itself will create an authority to make such a payment.

You were convinced by Graham Stoodley, who is the legal counsel for the Treasurer (Mr. Grossman), and Mr. Zacks, that the amendment should not be in the Financial Administration Act but in the Ombudsman Act. You will recall the specific language of the amendment was placed before you last time and there was some discussion. That is why in recommendation 4, as set out in this material, you recommended to the Attorney General (Mr. McMurtry) who is responsible for the Ombudsman Act in the House, that he include that amendment in his package of amendments to be tabled.

In consequence of that, you will see from the material that I wrote to Mr. McMurtry in July and he responded to me in August indicating that a submission to cabinet is being prepared which presumably will include this particular amendment, among others. Mr. Zacks may or may not be able to confirm that.

Mr. McMurtry expresses the view that because it will be placed before cabinet shortly, it would be inappropriate for him or any member of his staff to discuss it any further. I understand that Dr. Hill and his staff concur in that view and, therefore, I have not requested the attendance of anyone from the Attorney General's office.

I would suggest it is a matter where you note the letter and, as you have expressed in other reports, express in this report your hope that the amendments will be tabled relatively quickly, and that instead of that bill being referred to the justice committee for consideration, it be referred to this committee before third reading.

Mr. Zacks or Ms. Bohnen, do you have anything to add to that?

Mr. Zacks: No. That amendment is part of the Ombudsman's package of amendments with the Attorney General.

Mr. Chairman: Essentially that really cleans up what we have on our agenda for this afternoon. Is there anything we have scheduled for tomorrow morning that we might do now to ensure that we have the afternoon free for estimates? Is there anything we can handle?

Mr. Bell: I am just wondering if you want to do tomorrow morning today. If you look at your schedule for September 25, you have already dealt with item 1. You dealt with item 2 when Government Services attended.

Item 3 involves two letters from the Ministry of Health; one reports on the implementation of two recommendations and the other is a progress report on two other pieces of legislation. Ms. Bohnen advises me that as far as the Ombudsman's office is concerned it is not necessary to have the people attend, the letter will serve, and I agree. Item 4 is another letter of--

Mr. Mitchell: I am sorry. You said No. 3 in volume 1?

Mr. Chairman: We are on the agenda, Bob.

Mr. Bell: I am just looking at the agenda for tomorrow.

Mr. Mitchell: Oh, I am sorry. Okay. I do not see anything pertaining to the Ministry of Health in there.

Mr. Bell: Yes. Ministry of Municipal Affairs and Housing--it is just a progress report on how they are doing on their amendments to their manuals. Item 5 we just talked about; that is the amendment to the Ombudsman Act. So there is really nothing that will take you that long.

Mr. Breithaupt: Will there be various other people attending because of these particular points?

Mr. Bell: No. There is no one on tap tomorrow to appear before you, other than the Ombudsman and his staff.

Mr. Van Horne: Let us finish this stuff now and go to the Ombudsman's estimates tomorrow.

Mr. Bell: The only matter that might take some time--do you want to do as much as we can now?

Mr. Chairman: Which matter do you think might take some time? We can leave it until tomorrow morning.

Mr. Bell: Well, on communications from the public--not that you have any communications to receive--I intended to speak to Ron before tomorrow morning, but let me do it now.

Other than the endorsement by the committee of that procedure which Graham had prepared, and other than to reference, again, that these matters will be addressed by the subcommittee as and when they are received and perhaps ask Dr. Hill for his particular comments on how the committee handles these with his office--he may want to suggest a change of style--there is nothing else to do on that one. That is the one which will take some time.

Mr. Chairman: Let us leave that one until tomorrow and clean up the rest of them.

Mr. Bell: In so far as rules are concerned--these are the rules for the guidance of the Ombudsman in the exercise of his functions--you have said in the last two reports, and I think it is relevant to today, that because the amendments to the act are reasonably imminent it would not be appropriate to talk about enacting any rules before you see what those amendments are, because some of them may be embodied in the amendments and, conversely, some rules may become necessary or important in view of some amendments.

The third factor is that because Dr. Hill is relatively new in his position it is a little unfair to ask him to comment about whether or not any specific rules are appropriate now. For all of those reasons, I think it is best to defer any discussion of rules until after that bill is tabled and ultimately passed.

One thing you are going to have to do when that bill is passed is look at the present rules to see whether or not there is any conflict and whether you should be amending those to conform to any new legislation. You have already talked about amendments. They are coming, you have heard. I would suggest you restate your expectation, if you will, that the bill be referred to this committee rather than the standing committee on administration of justice, for very obvious reasons.

Mr. Zacks, has there been any express discussion with the Attorney General on that point?

Mr. Zacks: The issue was raised, primarily as a point of my own interest, as to which committee would have the bill before it, and they basically indicated it was a matter for the Legislature to decide. I do not think there are any strong views on which committee should handle it.

Mr. Hodgson: Mr. Chairman, it would be up to the minister to direct the bill to a committee.

Mr. Bell: That is what I always thought.

Mr. Zacks: Maybe I got the House information--

Mr. Hodgson: It is up to the minister to direct it and not us.

2:50 p.m.

Mr. Breithaupt: If there is a view that the committee would be prepared to have it, and would wish to have it, I am sure the minister would be amenable.

Mr. Hodgson: I am just saying he has that privilege, to make that direction or whatever--

Mr. Breithaupt: Yes, unless 20 of us stand up, and I would think we would hope to avoid that kind of procedure with a bill like this.

Mr. Hodgson: I am not saying I do not want it here. I am just saying that the minister has the privilege.

Mr. Breithaupt: Right.

Mr. Bell: I guess the other thing you could talk about is whether at the appropriate time this committee would approach the justice committee in any event--or maybe you approach justice to get their views beforehand, I do not know.

Mr. Breithaupt: I do not think that would keep it going for another couple of years. I hardly think it would be practical to do it beforehand.

Mr. Bell: There is not really a lot more you can say about this subject until it happens.

Mr. Bell: That is all I have. Tomorrow we have communications from the public. I do not even think you have to reference the five items under recommendations not implemented. The letters are in your material and you can deal with them.

Unless Ms. Bohnen or Mr. Zacks want to say something specific on any one of those tomorrow, I do not think it is fair--you may not have prepared any comments this afternoon, but can we leave it this way. If you have any comments to make about any of those five matters under recommendations not implemented, make those submissions at the outset tomorrow and then we will go right into communications from the public.

Ms. Bohnen: I think we are prepared to review them with the committee this afternoon, if you prefer.

Mr. Bell: Sure; all right.

Mr. Chairman: Sure.

Mr. Bell: Let us go at them. Members of the committee, if you go to B in volume 1, I will take them in the order in which they are found.

Tab 5 we have done, Ms. Bohnen. I was dying to speculate, but I did not, what the quid pro quo was in consideration of that \$15,000 payment; we may find out some day.

Tab 6 is the Ministry of Government Services and we have dealt with that again; that is the amendments. The second part is the amendment or what may no longer be an amendment to the Superannuation Act respecting the restriction on superannuates returning to the work force. There is a restriction on earnings and you will recall from your discussions with the chairman of the board and with Mr. Cooke from the ministry itself. You have enough on the record to comment on that in your report.

Tab 7 is the Ministry of Health. After the copies of the relevant pages of the appendices, you will find a letter to me dated June of this year from the Assistant Deputy Minister of Health, Ron LeNeveu, commenting upon everything in--

Interjection.

Mr. Bell: No. It relates to what is referenced as Ombudsman's report, detailed summaries 9 and 10, at page 98 of the material and also at page 99 of the material in this section. Essentially I read this letter as a report that the matters have been implemented to the extent of the committee's recommendations and as they were subsequently discussed with you by Mr. LeNeveu and members of his staff.

Ms. Bohnen: I believe this does implement the recommendation.

Mr. Bell: You will take these matters out of the appendix?

Ms. Bohnen: Yes.

Mr. Bell: The remaining matters, members of the committee, deal with certain amendments to the Public Hospitals Act dealing with hospital privileges, and there is another amendment to the Nursing Homes Act that is still outstanding; I am not sure whether Mr. Bernstein does address that.

The last document you have in this part is a letter from Mr. Bernstein to me on September 5 commenting on the Nursing Homes Act issue. Ms. Bohnen, what do you have to say about this?

Ms. Bohnen: I do not have Mr. Bernstein's letter in front of me. I saw it last week, but I did not bring it with me.

Mr. Mitchell: It basically says they did make a mistake in a couple of their calls.

Mr. Bell: We will get a copy of it for you.

Members of the committee, you will recall last fall that, albeit acknowledging that the amendment was slow in coming, notwithstanding that you had been promised it for some time, Mr. Bernstein came forward with a suggestion from the minister that, until the amendment is passed, the matter be resolved in a practical way. You accepted and endorsed that practical solution.

Mr. Bernstein refers to that practical solution, but he also tells you about the efforts of the ministry for--well, no, he is just actually giving you a report on how the practical solution has been implemented. You endorsed that practical solution last time, and I think it is commendable that you have been given some specifics on how it has been implemented.

I guess the remaining question, Ms. Bohnen, is whether we still have to put the outstanding amendment on the books as an outstanding matter.

Ms. Bohnen: I think you do until the amendment is passed, which he anticipates will be before the end of this year.

Mr. Mitchell: We are talking about the one to the Public Hospitals Act, are we?

Mr. Bell: No, we are talking about the Nursing Homes Act.

Mr. Mitchell: There is no amendment to the Nursing Homes Act.

Ms. Bohnen: I am sorry. The arrangement that Mr. Bernstein reports on was intended to be an interim arrangement until there are amendments to the Nursing Homes Act. I do not believe the act has been amended yet, so we will continue to report it as is until those amendments are made.

Mr. Bell: Any suggestion on what the committee should do or could do?

Ms. Bohnen: I do not believe it is a matter of urgency, given the ministry's commitment to require these undertakings. It appears that the ministry has corrected the communications problem within the ministry, so I would think just noting it and continuing to monitor it is sufficient.

3 p.m.

Mr. Bell: Okay. The second matter is the amendments to the Public Hospitals Act. Committee members, you have said before that, with respect to the proposed amendments and the way in which those amendments were formulated, you were content. There was,

however, a matter outstanding from the original Ombudsman recommendation which the Ombudsman drew to your attention last time; that is, that the process leading to the amendments did not include an invitation by the ministry for submissions from the public.

You drew that to the ministry's attention and, I think fairly, stated you had a response saying, "No, we did not and we do not anticipate we will." Is it fair to say, Ms. Bohnen, that with the exception of the passing of the amendments or the tabling of the amendments, when that is done, the lack of public participation is your remaining concern?

Ms. Bohnen: Yes, except to say that, as I recall, Mr. Bernstein's explanation as to why the ministry did not intend to solicit further public input was more or less accepted by the committee and the Ombudsman. I do not really see any point, after the amendment has been made, in continuing to report the lack of public input as an outstanding issue. I think it is a dead issue.

Mr. Bell: That is what I was going to ask you. How strongly does the Ombudsman feel the committee should continue to get involved in this as outstanding just because the public's views have not been solicited? I do not mean to demean it as an issue but--

Ms. Bohnen: We are not actively pursuing it.

Mr. Bell: Okay. Other than that, as you have said with the last one, it is a question of monitoring these regulations when they may be passed and in force.

Ms. Bohnen: Yes.

Mr. Bell: I have nothing further to add to that, members, unless you do.

Item 8 is the Ministry of Municipal Affairs and Housing. It is really the Ontario Housing Corp. continued amendment or revision of their manual of practice or administration. You will recall about four reports ago you made certain recommendations that the amendments should have regard to the rules of administrative fairness as far as decision-making processes relate to local authorities. Since that time, you have been receiving these amendments on a semi-regular and progressive basis.

What is left, if this committee chooses to have it done, is a review of the amendments against your recommendation for a determination of whether the rules of administrative fairness have been addressed. We have been told by the corporation it has endeavoured to do that, but you have not yet considered it or had it considered from your own perspective.

Ms. Bohnen will comment on this, but I suggest, Mr. Chairman, it is probably timely for you to consider whether you want to have that task undertaken at the expense and with the resources of the committee or whether you want to, frankly, throw it over to the Ombudsman's office to do it as it is advised or to

leave it to someone else to raise the issue that the rules have not been appropriately addressed in the amendments.

Ms. Bohnen: The issue of natural justice and administrative fairness to Ontario Housing tenants is contained in a relatively small part of the manual relating to tenant placement, transfers, refusals to place, evictions and so on.

I do not know that it is the gargantuan task it might otherwise seem to be. We receive many complaints from tenants and would-be tenants in the various housing authorities across the province and they frequently raise aspects of the corporation's policies on these matters. We end up monitoring them and the Ombudsman will comment on them as the need arises.

If the committee does not choose to do its own review of the procedures, we do stay in touch with tenant placement policies, etc., in Ontario housing in so far as these matters come to our attention via complaints, as well as with how the individual housing authorities implement Ontario Housing Corp. policy. That is not an invitation for us to review the manual overall.

Mr. Bell: When governmental organizations act on or implement your recommendations, in the normal course of events you consider what they have done to determine whether there has been compliance.

Ms. Bohnen: Yes.

Mr. Bell: That would apply in this case as well.

Ms. Bohnen: Yes.

Mr. Bell: I do not mind admitting that I have not looked at these manuals for that determination. I guess your office does not mind admitting the same.

Ms. Bohnen: It must be two years ago anyway that we looked at the changes OHC had made in relation to tenant placement, tenant transfer and eviction. I believe we found those changes to the manual to be satisfactory. Now in investigating complaints we really focus on how individual housing authorities apply OHC policies in these matters.

Mr. Bell: That is a little different.

Ms. Bohnen: Yes, it is different. We do not have any problem with their current policy.

Mr. Bell: It would not be unreasonable then for the committee, if it chose, to adopt the view that unless it hears from your office to the contrary on a specific matter, it can presume that the amendments have given effect to its recommendations. That is putting it squarely on the shoulders where I think it should be.

Ms. Bohnen: We were interested in administrative fairness related to the complaint that brought all this to the

committee's attention. That was in relation to a housing authority's refusal to house someone.

The committee took the matter further and requested that OHC furnish it with all of its multi-volume manual, so that a review of it could be undertaken, presumably by the committee, to see how in every respect it has adopted rules of administrative fairness, and so on.

Mr. Bell: Let us take it this far: as far as Ombudsman recommendations are concerned, this matter has been implemented to the satisfaction of your office.

Ms. Bohnen: Yes.

Mr. Bell: In so far as the implementation of committee recommendations and amendments that have been forthcoming are concerned, any review by your office has not resulted in any concerns.

Ms. Bohnen: That is right.

Mr. Bell: I suggest that the committee now has enough to decide whether it wants to instruct staff to undertake any further review of those amendments for the purpose of determining whether your recommendations have been complied with. My recommendation is that the committee not so instruct staff. I think it is a make-work project and, unless some specific matters are brought to your attention from the Ombudsman or from some other source, you ought to consider the matter to be complete as and when the amendments are finalized.

Mr. Breithaupt: I agree with that.

3:10 p.m.

Mr. Bell: We have already done item 9; that is the Financial Administration Act-Ombudsman Act amendment. We have already done item 10, the Workers' Compensation Board. That completes this part and that would be it for today, as far as public session is concerned.

Tomorrow morning we can spend some time on communications from the public. I think it may be a blessing that we can take a good portion of an hour to hammer out once and for all, or for an ongoing basis, exactly what this committee and what the subcommittee will do.

There is one other item. Ms. Bohnen indicated to me before we started this afternoon that Dr. Hill would like, if time is available tomorrow afternoon, after you consider the estimates, to make a closing statement. I indicated that, with the exception of time constraints tomorrow afternoon, the committee would not have any problem with that.

Mr. Chairman: We are well ahead of schedule.

Mr. Breithaupt: Would it be practical to begin the estimates, say, at 11 o'clock in a formal way so that clearly the time is there to be used fully if needed and we would then have some additional time for Dr. Hill, should that have to be fitted in?

Mr. Bell: I think that is a good suggestion because there are some things I would like to kick around with Dr. Hill, not the least of which is starting a discussion on how the committee deals with things such as computing medical reports. I do not think we have to get into it in a lot of depth, but perhaps throw out some comments for consideration.

Mr. Chairman: I would suggest to Ms. Bohnen and others on the Ombudsman's staff that they be here at 10:30 tomorrow if they can. At 10 o'clock the committee will meet to have a briefing session on the estimates so that we will be ready. We hope we can finish off the other business and be ready to go into the estimates at 11 o'clock.

Mr. Hodgson: Mr. Chairman, before we adjourn, was this brought up on Thursday when I was not here? We used to get an individual report on the number of cases investigated by the Ombudsman in each individual riding or constituency. We have not had them for a long time. Is it possible to have that produced?

I would like to know how many cases went to the Ombudsman from my riding. We used to get that all the time.

Mr. Breithaupt: I do not know whether they keep it by riding any longer.

Mr. Zacks: Yes, we do.

Mr. Hennessy: I would like to ask for northwestern Ontario and Thunder Bay also.

Mr. Hodgson: I am talking about every riding.

Mr. Hennessy: I understand. I am just concerned myself.

Mr. Chairman: Mr. Zacks, you can note that interest has been expressed in this.

The committee adjourned at 3:15 p.m.

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SELECT COMMITTEE ON THE OMBUDSMAN
ESTIMATES, OFFICE OF THE OMBUDSMAN
TUESDAY, SEPTEMBER 25, 1984
Morning sitting
Draft transcript



SELECT COMMITTEE ON THE OMBUDSMAN

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Sheppard, H. N. (Northumberland PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon
Madisso, M., Research Officer, Legislative Research Service

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations
Hill, Dr. D. G., Ombudsman
Meslin, E., Executive Director
Mills, A., Controller
Zacks, M., Director, Legal Services

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, September 25, 1984

The committee met at 10:51 a.m. in committee room 1.

ESTIMATES, OFFICE OF THE OMBUDSMAN

Mr. Chairman: The first matter we are going to deal with this morning is the estimates of the Office of the Ombudsman. Dr. Hill, do you have any opening remarks you would like to make?

Dr. Hill: Yes, I have. I will distribute them to you and read them. You can read them along with me. I have an opening statement that will take just a few minutes to read. I hope it has been distributed to all members of the select committee.

Mr. Chairman: I think everyone has a copy now.

Dr. Hill: Gentlemen, before beginning our discussion on the estimates, I would like to make some further remarks regarding my fiscal philosophy and future plans. I will also be answering the questions you raise in response to my opening remarks.

As you know, the Ombudsman's primary function is to investigate complaints against administrative decisions and actions of officials of the government and its agencies. To carry out this mandate, I need a competent staff and an adequate budget, but that is not all. To use staff and funds economically and efficiently, I must have a sound system of fiscal and management control.

My executive director and my controller have the primary responsibility for developing adequate management controls to ensure due regard for the economy, efficiency and effectiveness of the services we provide. These include:

1. A planning and budgetary process that involves all levels of management from the beginning of the budgetary planning process to their accountability for achieving results. Such a process would encompass an in-depth study of cost efficiencies and the reallocation of savings to pay for new programs; the development of a management information system that provides necessary information on staff utilization and complaint file processing in order to determine whether management's budget decisions are producing cost-efficient results; and adoption of the Ontario Manual of Administration as a guideline for compliance with policies and procedures.

2. An overall examination of complaint file processing to assure me our procedures promote efficient and effective processing of all files.

3. An in-depth review of significant expenditures such as the computerized data and word processing system, the regional and satellite offices, staffing, travel and new public education programs.

The details of the above initiatives as they relate to our estimates discussions will be outlined later. However, it is important to point out that I have already undertaken a number of steps, including changes in senior personnel and changes in policies and procedures, to achieve cost efficiencies. For example:

1. By the end of this fiscal year, we will have reduced our expenditures for the rental of office space in Ottawa by \$7,200. This was achieved by moving to less expensive but equally accessible premises.

2. Our current budget provided sufficient funds to lease six vehicles. In June the leases on five of these vehicles expired, and we decided to buy two vehicles with the money made by discontinuing the leases. These two vehicles are expected to last for three years, and we should therefore not require any funds for this purpose during the next two fiscal years. We have also saved the operating costs on the three vehicles we did not lease during the current fiscal year.

3. We have offered to sublet space in our building to Mr. Sidney Linden, the public complaints commissioner. If he accepts our offer, we will save \$4,000 per year on our rental costs.

4. We have saved \$39,000 by deciding not to hold hearings. This amount has been transferred to provide some of the funds for the operation of the newly established communications and public education directorate.

5. We are currently examining a proposal provided to us by Bell Canada to reorganize and update our present switchboard equipment. If we accept Bell's proposal, we could save \$250,000 over 10 years. However, we are carefully studying all the cost implications of the proposal.

The problems of managing resources which confront me as Ombudsman in delivering service to Ontarians are similar to the problems faced by a deputy minister whose ministry delivers service to the same clientele. Therefore, I believe it is appropriate for my office to adopt management practices similar to those used by the ministries, even though the Ombudsman's office is not legally required to do so.

We have started adopting the sound management practices I previously mentioned. The planning and budgeting process for the next fiscal year has already begun. Our senior management, including the executive director, controller, directors and manager of administration, will be meeting to examine our previous budgets and discuss their resource needs for next year. Much of the philosophy for our planning and budgeting practices will be based on the government's Ontario public service management series booklet, Operational Planning, Budgeting and Reporting Processes.

In specific terms, the office has adopted the concept of management by results. This concept places equal emphasis on results and resources and is premised on the monitoring of results. MBR will provide a formal record of expected results against which to measure actual performance expressed in terms of client (complainant) benefits.

As Mrs. Meslin indicated in her opening remarks to the committee, the statistics and records committee has already developed a number of new procedures for recording the status of each file.

Fast action complaints are now being coded in the same way as complaints in files to provide us with better disposition statistics for reporting purposes. We have also instituted the policy of placing all fast action complaints which come from one complainant in a numbered folder. This enables us to build a history profile for the complainant, which in turn permits better control and therefore better service to the public.

In addition, we have instituted a pilot project to help speed up the post-case conference process that, if successful, could significantly reduce the amount of time spent.

During our analysis of the effectiveness and cost efficiency of both our computer and word processing systems, we have been considering various alternatives. These include purchasing or leasing equipment; the integration of the present information systems into a common data base; and the appropriateness of continuing to use the University of Toronto's facilities. Before any action is taken, we will have a feasibility study performed. In this regard, four firms have been invited to make proposals.

Before going any further, I would like to give you some of our past computer costs and some preliminary estimates of the costs involved in bringing our data processing systems completely in-house.

11 a.m.

Currently, we rent word processing equipment which has limited data processing capabilities. These capabilities do permit us to operate a file tracking system for open files but do not permit us to maintain statistics on our closed files. For this latter purpose, we are using the University of Toronto's computer facilities. You will appreciate that this is costly now and will become extremely costly. The figures on page 7 illustrate this point clearly, and you may look at the figures in the third paragraph.

If the costs we have experienced up until August 31 continue, we will have spent \$185,000 in this one area by March 31, 1985. This represents an increase of 52 per cent in costs. We have therefore examined alternative approaches carefully.

The increased costs charged by the university are only one problem in continuing to use their facilities. The university has decided not to support certain programming languages which we use

at present. Because of this, our processing is delayed and errors occur.

The university's decision will also force us to restructure the data we store at its facility so that it can be processed by the new languages which it has decided to employ. The one-time cost of this conversion has been estimated at \$150,000. As long as we process our data at the university, we are liable to incur such costs. Clearly, we would not be vulnerable to this sort of change and additional expense if we did our own data processing and had complete control over the program languages used.

The firm from which we rent our word processing equipment has made a proposal to lease us new equipment which has all the data processing and word processing capabilities we require at present or which we can perceive requiring. Leases are available for three-, four- and five-year periods, the latter being the least expensive at \$148,728.

If we assume that the university's rates and data entry rates will increase by five per cent per year over the next five years, then we could face a cost of \$200,000, money which could well be applied towards the cost of leasing the new equipment.

Finally, a very significant advantage of the new proposal is that the equipment would permit us to transmit and receive documents, such as letters to and from our regional offices. Thus another means of communicating rapidly and precisely with our regional offices would become available to us. In addition, our regional offices would acquire a limited amount of word processing capability, which they presently lack.

The committee has inquired about our regional offices and the costs of our outreach programs. First, the estimated costs of establishing the two satellite offices in Kenora and Timmins, including the salaries of two full-time employees, are \$81,000.

The outreach programs include community meetings and the distribution of pamphlets, newsletters, etc. As I outlined in my opening remarks, I intend to arrange community meetings by working in conjunction with local groups. This will reduce expenditures for the meeting itself--rental of the hall, advertising, etc. We estimate that printing and distribution costs for pamphlets and newsletters will be \$36,000 this fiscal year.

In accordance with Manual of Administration guidelines, travel by employees outside the province or the country has been stopped without the prior approval of the executive director and the ultimate approval of the Ombudsman. In addition, closer scrutiny of all travel expenses has been initiated.

In terms of staffing efficiencies, there are 122 employees on staff at present. This number includes six articling students, who are not counted for complement purposes, and six contract, noncomplement staff.

As you know, I have made the positions of executive assistant, hearings co-ordinator and hearings officer redundant at an annual saving of \$91,530. Although I have created a new directorate of public education and communications, I have simply transferred the three employees who were already on staff to serve in the new directorate and have not hired replacements for their former positions. I have hired only one new full-time staff member for this directorate.

As for the new positions of chief, training and staff development, and chief, regional planning and development, both positions were filled by employees already on staff. I do not intend to fill the vacant position of one of them and I am still considering whether to fill the other vacancy. I estimate all this will represent a savings in salaries and employee benefits of \$198,551. I intend to use this amount to finance my satellite offices and other programs. I hope my remarks have helped to answer your estimate-related questions.

To sum up, I should point out that since my appointment, I have initiated overall savings of approximately \$206,000 on an annual basis. There will undoubtedly be fuller opportunities to make additional savings and we will consider each opportunity carefully. I have described to this committee the many initiatives I wish to take. I hope that after hearing of the steps I have taken already in the direction of fiscal responsibility, you will support my future plans. Gentlemen, I thank you.

Mr. Van Horne: Mr. Chairman, I appreciate the effort the Ombudsman and his staff have gone to in presenting this to us. Another observation is that since this is a first for this committee, I think we should be mindful of how we arrived here. The estimates have not been a responsibility of this committee to my recollection up to this point; yet we did run into circumstances a year or so back that created problems for us as a committee.

As I recall it, our concern a year or so ago was that the Ombudsman's task be done as effectively and efficiently as possible. In so far as the dollars and cents of the operation are concerned, I think most committee members were of the view that the Board of Internal Economy had a responsibility in that area and that this committee should be mindful of that and not get itself too involved with the review of dollars and cents. Yet here we are, looking at dollars and cents. Unless I have misunderstood the past history, I would say we have to be mindful, as we look at these things, to look at them in terms of the job being done effectively and efficiently.

Having said that and having had the opportunity to hear the Ombudsman's comments, I would like to direct a couple of questions in the area of staffing and then in the area of procedures, particularly as they relate to the electronic capacity of the service he is looking to expand.

We all had a concern a year or so back that the size of the office staff was maximal. The Ombudsman has indicated to us that he is trying to fit in an outreach program and trying to be

cost-efficient in his Toronto operation. I wonder if he could indicate to us the numbers that existed in total last year and the numbers as he sees them now and give us some indication of any shift.

Are the numbers the same? Has there been any shift in terms of the number in the Toronto complement versus the regional office concept? How many are involved in that?

11:10 a.m.

Mr. Chairman: Mr. Van Horne, Dr. Hill, I just wonder if I could interject. If Mr. Van Horne would continue with his opening remarks and questions, you could simply take note of them. Then when the New Democratic Party critic has made his comments, you can respond to both of them following completion of that.

Mr. Van Horne: I do not have a prepared text. I simply want to reiterate the two themes we have to keep in mind, the effectiveness and the efficiency of the office. If you want to leave specific questions until later, I will be glad to do that.

Mr. Chairman: The critic for the New Democratic Party has indicated he has a concern about time. That was the only point.

Mr. Philip: My problem is that I am in another committee. I have come in to make a few remarks.

Mr. Van Horne: I do not think our remarks here have to be extensive. I will be quite happy to leave the specifics to the rest.

Mr. Philip: I guess this is the first set of estimates I have ever attended as a critic in which I have to start by saying, "You are doing a good job." I have little to criticize so far.

I am pleased that you are implementing many of the things that I and other people on this committee have asked for for many years. I have said off the record, and maybe I should say it on the record, that if you keep on this way you may well become known as one of the great ombudsmen of the world. I look forward to being very proud when you are so recognized, perhaps in a few years' time.

I would like to explore a few directions with you, because there is no sense recycling the past or simply tooting your horn for you as to the improvements. We have already gone over that. We are delighted they are happening and that you are doing such a good job.

I would like to deal with a few philosophical areas. One of the things that Friedmann, who I think is one of the great ombudsmen, dealt with in a paper I know you have read is that in a cabinet-controlled jurisdiction it is the bureaucracy that drafts legislation. Often the bureaucracy has a vested interest and is in a conflict of interest. It naturally limits the power of the Ombudsman while at the time extending its discretionary powers.

Friedmann points out that in the United States there is a different system. There the legislators and their staffs, rather than the bureaucracy, draft the legislation. I think that is an important distinction. When you are coming at it from two different points of view or interest, it creates the possibility of a conflict.

The problem that then arises is, what is the role of the Ombudsman in dealing with that conflict? Is there something in the process that you feel you should recommend to government which would at least correct what Friedmann sees is a basic conflict of interest in the bureaucracy? Am I too airy-fairy in asking that question?

Dr. Hill: I was immediately swamped by administrative problems and I admit I have not addressed myself to that question, nor have I thought about it at great length.

I certainly feel it is the Ombudsman's role to be very much involved in the drafting of the legislation and to be guided by the advice of his staff, not by civil service staff but by the staff in the Ombudsman's office, and to have the opportunity to vet it with the legislators as well. I do not see where they are mutually exclusive in that sense. I cannot see the mutual exclusivity of the two.

Mr. Philip: You have a couple of problems. One is the public servant who uses discretion aggressively; the other is what Dr. Karl Friedmann calls administrative laziness, in which he does not use discretion at all and in fact relies, rather, on the book.

You have addressed yourself to the latter in a number of the cases you have dealt with. You have said, for example, as I recall in one of the Ombudsman's cases on workers' compensation: "Here is a guy," the hearing officer, "who is technically right in saying, 'The applicant and his advocate did not ask for that'; he passed the decision only on what was asked for and, therefore, if the applicant wants the other, he can start at the other end of the line and work it through. We, on the other hand, have examined it and said, 'A little discretion should have been used by the arbitrator, who should have said, 'Other things are open, and we can recommend this.'"

That is a case, as I see it, in which you have said there is a failure of the bureaucracy to use adequate discretion and that the justice of the case--I think those were your words--should have been exercised.

I am asking you whether you have examined where discretion has been abused and whether there is some system--or some rules, if you want--of administrative behaviour that we can develop to the point at which we can say, "Discretion has been abused."

There is an increasing possibility of the first side, of the overuse of discretion. As society becomes more and more complicated and as legislation comes in that is more and more vague and that gives the bureaucratic system more discretion than

it did in simpler days when you could legislate more specifically, what do you see as your role in coming to grips with that? Is there a process? Is there a code? Is there something that has to be developed on maladministration that can deal with the overuse or the misuse of discretion?

Dr. Hill: As I said before, we have been looking at the question of discretion and in many cases I have been involved in it. I have not developed rules as such--unless you are looking at my code of administrative guidelines--to deal with it and I have not developed mechanisms to deal with this question of discretion. It is something in which we have to gain a bit more experience before we talk about developing rules and guidelines. It can be questioned, and I am trying to question it when I think it is possible; but in respect of rules and guidelines, no, that should still be looked at and developed.

Mr. Philip: In Quebec the courts cannot review discretion, they can review only whether the public servant has used discretion that was not open to him under an act. Do you feel that the courts should have the right to review this, or should it be the role of the Ombudsman?

Dr. Hill: Again you have me at a point where I would like to give this more thought. I am of the belief generally that the courts have a right to review anything and should, indeed, review things, but I cannot state a position on this yet. I would have to give it a bit more thought.

Mr. Philip: One of the positions taken by Bauer in that system, which I found intriguing--and I do not want to make a television star out of you--in the TV show that dealt with the Ombudsman, A Case for the Ombudsman, a TV series in which there is a re-enactment of typical Ombudsman cases--

Dr. Hill: Is this the series that used to be on Canadian Broadcasting Corp.?

11:20 a.m.

Mr. Philip: No, this was the one in Germany, is it not? Dr. Franz Bauer, the Ombudsman in Volksanwalt, Austria.

One of the things we found in northern Ontario, and I think the same thing we find in constituents who come to me, is they really do not know what the role of the Ombudsman is. I have examined some of the interesting printed material you are turning out, but I think the average citizen still does not know what an Ombudsman is or what his role is.

I am wondering whether you agree that perhaps that kind of format or some kind of media show that would act out the drama of the Ombudsman solving problems would be useful. Would that be a way of showing, one, that the Ombudsman has some power and influence, and two, the kinds of problems the Ombudsman can deal with?

Dr. Hill: I think it could be useful. Of course, that

could be a technique and a way to do it, but I have another way I am very much interested in, particularly in the north. I mentioned this earlier in the statement I made at the beginning of our meetings.

The only way the residents in the north and in other parts of Ontario will have a better understanding of the role of the Ombudsman is to develop with us community programs and community education programs. In other words, I want to see them involved in the setting up of the conferences, the setting up of the discussions, the setting up of the educational meetings, instead of having an overlay.

The problem, as I mentioned earlier, is that government operations and private organizations have too frequently gone into trying to educate the public about the role of a ministry, of the Ontario Human Rights Commission or of the Ombudsman by lecturing and talking to people. My theory is you have to do it the reverse way. You have to sit down with the people and plan together the programs, be it television, radio, media, conferences or seminars, and have them plan with you the educational things they will do. That way, they will be able to transmit it back in a much better form to their own constituency.

I am driving at a joint involvement with community groups instead of a straight educational, media or whatever kind of program. I think it is a better approach.

Mr. Philip: So you see a media component?

Dr. Hill: Certainly.

Mr. Philip: It strikes me when you hold community meetings, and I do not think my community is different from any other--indeed, when I worked for the Ontario Federation of Agriculture as director of leadership training, we had meetings all over the province. The fact is that no matter how well you advertise things, you get only a small percentage. They may be more dedicated, they may be more interested, or they may simply be the ones who had nothing else to do that night, but you--

Dr. Hill: I like to share the media with the constituents in the area. In other words, if I am involved in a media program, if it is possible to do so, I like to share the media with the parties involved. The native people sit down with me on a panel or in a discussion group. They ask me questions and I am not lecturing to them. It is the lecturing format I am trying to avoid.

Mr. Philip: In certain jurisdictions the Ombudsman has the power to recommend that in cases where procedures have been followed and there is no fault in procedure, there are still hardship cases where justice is not being served, although procedures have not been violated. For example, a person owning an expropriated house may receive what it is worth, but may not receive sufficient funds to replace it.

Do you see that as a kind of discretion the Ombudsman should have in this province, and would you use that kind of discretion? You may say there is no fault in procedure, technically there may not be any injustice, but the merits of the case say there is a hardship element and there should be compensation for the hardship element.

Dr. Hill: My answer is yes, I would try to follow that. If the procedures had not been violated I would look to the same kinds of procedures I would try to use in the human rights commission informally to get some type of adjustment or settlement or assistance to the party that was agreed, irrespective of whether we had jurisdiction or not. Does that answer your question?

Mr. Philip: Do you have any cases where that has happened?

Dr. Hill: I cannot tell you immediately.

Do we have a case of that nature, where we have informally been able to assist a party and resolve a situation on a matter that did not have a formal component to it?

I cannot give you an exact example of it.

Ms. Bohnen: First, Mr. Philip, we do consider cases where, although the procedures have been followed on the unique circumstances of the particular complainant or his case, the Ombudsman might, nevertheless, decide that something above and beyond what is called for by those procedures or the law is reasonable.

The procedures that have been established may not suit a particular complainant's case or needs, and I do not think the Ombudsman would feel he cannot support a complaint or try to achieve the result for someone just because technically all the rules and procedures have been followed in his case.

Certainly all of the investigators and lawyers, as well as the Ombudsman, try to conciliate and negotiate settlements of cases, even where technically no wrong has been done, because it is in the interests of both the public servants, the ministries, and the complainants to do that.

Mr. Philip: Would we then at any time see an actual case come before us in which you say: "This workers' compensation person has been awarded what he is entitled to under the act. However, we feel that in this case the hardship to this man and his family is such that there should be an additional award based on compassion or based on hardship"? Can we envision seeing something like that happening?

Ms. Bohnen: To put it in a slightly different way, you have already seen a case like that. If you recall, last year there was a case concerning attendants' allowances where the board had followed its policy on providing money for an attendant to a worker who had suffered a head injury. The Ombudsman felt that the policy itself did not provide this person with the care that he

required realistically and he recommended something in addition to the board's policy.

He also recommended that the policy be reconsidered, but that is an example of where we certainly do go beyond what the board's, or any ministry's, actual policies provide.

Dr. Hill: Indeed, I think that is the role of an Ombudsman, and my short answer to that is, yes. You have to deal with the specific case, but in terms of what I consider the classical role of the Ombudsman, I would say, yes. That is my short answer.

Mr. Philip: One of the components running throughout your various speeches and comments is the role you see as a conciliator, and you have a good record of that at the human rights commission and so forth. In addition to that, I am sure you would admit that if you go across the world of ombudsmen, there are certain ombudsmen who have a fairly high profile and certain others who are perhaps closer to the model of conciliation and maybe even a form of arbitration.

11:30 a.m.

One of the arguments made by people like Friedmann, who receive a lot of press coverage, is that publicity is the greatest security in correcting injustice. I am wondering if you have worked out in your mind whether there are types of cases where it becomes important for you, if you are going to change the system, to lay down and put aside the conciliator role and use the hammer and the publicity role in order to achieve your objectives. Do you see this happening? What are the kinds of instances where you would see you are taking a more active, perhaps public role, rather than just correcting an injustice?

Dr. Hill: One of my amendments, Mr. Philip, provides for me, at least if we want to, to be able to make a report or go to the public if I need to, as other ombudsmen in other jurisdictions have been able to do, and use that medium, but not going directly to the press, because I think that can harm the conciliatory process. It hardens the conciliatory process. When one is going back and forth trying to get the rights with the complainant straightened out, I do not think that is a correct approach. By special reports and by spelling out to the public through that mechanism, I think that is the way one should go. I want that as an amendment to rectify some of the things you have mentioned.

Mr. Philip: You are saying that will be an amendment?

Dr. Hill: I am proposing it.

Mr. Philip: You are proposing it. While we are talking about possible amendments, in France the ombudsman can intervene when other processes are taking too long. Do you see that as part of the powers you want to exercise?

Dr. Hill: Intervene through an amendment?

Mr. Philip: In the middle of a process. There may well not be an injustice other than the fact that a particular process is taking too long.

Dr. Hill: I would like to do that anyhow. I do not think I have any legal mechanism. We have not mentioned anything in our amendments to handle this, but I think we would do that anyway. In other words, I can write to that deputy, or not even write to him but write to the minister or talk to the minister and get that corrected if I want to do it that way.

Mr. Zacks: We could do that now. If there is a complaint that a specific tribunal is delaying or the process is taking too long, that is a valid complaint.

Mr. Philip: You do not need any changes then to the act in order to do that.

Mr. Zacks: Not for that. If you are saying that the complaint is delay and too much bureaucracy involved in some sort of hearing, we could investigate that issue of delay. But if the question is whether we could investigate the same subject matter that the tribunal is considering, the answer is no, we cannot.

Mr. Philip: What happens if the delay continues? Do you have any way of intervening at that point and doing the investigation?

Mr. Zacks: Not if it is a statutory right of appeal. Theoretically, I suppose if the matter was before the courts, we could investigate the same subject matter. Whether we would get the co-operation or whether we should investigate, the co-operation from the ministry is another issue, because there is a principle that rejects multiplicitious proceedings.

Mr. Philip: It is my feeling, for example, that in the case of the Housing and Urban Development Association of Canada home warranty program it almost seems as though they deliberately delay in the hope that people will get tired, pay for their repairs themselves and go away. If you look at the procedure of the HUDAC home warranty program and the countless letters, and I can take you through case after case after case, it is a system of justice denied by what can only be described in my experience as almost planned delays.

Under your system you cannot intervene and say, "Look, it has taken six months to get an investigator out there and it has taken 10 weeks for HUDAC to write to the developer and it has taken another 10 weeks for the developer to respond." Do you have a system in place that--

Mr. Zacks: If we had jurisdiction over HUDAC--

Mr. Philip: Which is a debate.

Mr. Zacks: Which is a debate; that is right--we could investigate process, if there were allegations of delay.

Mr. Philip: Are there other quasi-tribunals such as HUDAC over which you feel you should have investigatory power?

Mr. Zacks: I think there are not any that we do not have under provincial legislation. I cannot think of one off the top of my head that we do not investigate or that we cannot. The number of complaints vary of course. HUDAC really is not structured like a tribunal with an investigative process. Although they hold hearings, they make decisions internally and have appeals from their decisions to the Commercial Registration Appeal Tribunal.

Somebody might correct me, but I do not think they hold hearings within their own process the way the Ontario Municipal Board or the Workers' Compensation Board holds a hearing. You would make a claim to them and they would consider the merits of the claim and award damages or not; then you have a right to appeal depending on what they do. I am not sure that really answers your question specifically.

Mr. Philip: I would like to hear Dr. Hill's answer.

Dr. Hill: I would like to say something about delays generally. As far as I am concerned, one of the major areas of delay is the responses from the ministry to our correspondence, letters and proceedings; that is our major problem. That may not be totally rectified by this procedure but it can be speeded up by direct meetings with the deputy minister's counsels, deputies and the minister and getting their co-operation to answer our correspondence faster. When you get six-, seven- and eight-week delays in answering a letter, that is what really hurts and that is what hurts the complainant.

I have instituted a procedure now where I am meeting with all the deputies and meeting with the ministers, one by one, to specify this distinct problem and to get their co-operation in speeding up their correspondence and answers for us. In some cases it has already paid dividends. Talk about delays; that is one of the major problems of delays.

Mr. Philip: I am glad to hear that. I did not hear you answer my question on whether or not there are certain areas, such as HUDAC, where you feel you should have investigatory powers and jurisdiction over them.

Dr. Hill: I think I would have to consider that a little more, Mr. Philip, before I could answer that question.

Mr. Philip: Unfortunately I must get back into the other committee, but I thank you, Mr. Chairman.

Mr. Chairman: Perhaps, Mr. Van Horne, I should give you an opportunity to continue this morning.

Mr. Philip: And thank you, Mr. Van Horne.

Mr. Van Horne: It is my pleasure.

I have a few specifics, Mr. Chairman, if you will allow me. I tried to indicate at the beginning of my comments that we had to be mindful of what we are doing here as a committee and not get ourselves hung up with all of the details of dollars and cents. I think there is a role there for the Board of Internal Economy.

If I may just go to your opening statement, which we find on page 8 of the committee Hansard of September 6, you say you are committed to a salary administration program that is equitable and also comparable to other branches of government. I see in your letter to the Speaker, when you presented the estimates that--and these are your words:

"You will note we have not allocated any moneys for performance increases. We were instructed to budget salaries as of October 31, 1983, and await instructions from the Board of Internal Economy before we process any salary increases."

I am trying to underline that we should see ourselves as looking at the things that affect your efficiency and not necessarily get into the mechanics of your salary process.

That then leads me to the question you raised in your statement. You indicated the number of people you now have on staff. On page 10 of your statement you said: "There are 122 on staff at present. This includes six articling students, who are not counted for complement."

11:40 a.m.

We understood that a year ago you had 125 people on staff. That was the number that was commonly accepted. I do not know our source of that information but it sticks in my mind pretty clearly. Again, given that our general concern is the efficiency and effectiveness of your office, this would reflect a decrease of three.

Did that earlier number include the six or any number of articling students? What I am trying to get at is, are we comparing apples and apples? Did the articling group fall into the same classification as permanent staff or not?

Related to that, in your estimates you have charts indicating that in the North Bay area there are nine people on that regional chart. Is that an increase or decrease from a year ago? Beyond that, you have the additional couple on staff. That would be 11 as opposed to nine or whatever other number you have outside the Metro area.

Mrs. Meslin: I do not know where you got the nine in North Bay.

Dr. Hill: Could our controller answer some of them for you? I think he has the figures at his fingertips.

Mr. Van Horne: Let me see if I can find the nine. I may have misread the chart.

Mrs. Meslin: All the regional staff.

Dr. Hill: I think the total is nine.

Mr. Van Horne: Is that the total? Is there nothing in addition to that? Two are not tacked on to that.

Dr. Hill: No.

Mr. Van Horne: That is the last sheet. I have one further question relating to vacancies.

Mr. Mills: The letter you quoted from is signed by the previous temporary Ombudsman. The third paragraph you quoted is instructions we received from the Board of Internal Economy. They apply to all the agencies that report to the Legislative Assembly. There was a general prohibition against budgeting for either cost of living increases or performance increases. Presumably, that was done pending the government's decision on inflation restraint legislation. We were simply following the rules as they were given to us.

Mr. Van Horne: That is more the concern of the Board of Internal Economy than it is ours. My concern is with the numbers. Are you becoming more cost-efficient, implementing management by results and so on?

Dr. Hill: We are beginning to.

Mr. Van Horne: I am curious about the overall numbers, the 122 versus what I thought was 125.

Mr. Mills: I am not familiar with how the figure 125 was arrived at. Our approved complement is 122 people. That excludes articling students, however many there may be at any time. There is often a period of overlap during the year when we have as many as 12 on staff, but that is only for a matter of weeks.

The approved complement is 122. In addition to that, we apply for and receive funds to pay the salaries of articling students, of whom there are usually six. From time to time, on a part-time basis we have noncomplement positions. As far as the board is concerned, our approved complement is 122 people. That varies as there are vacancies, as people resign and as management decides not to fill certain vacancies.

Mr. Van Horne: Going back to the Ombudsman's opening statement, he said, "I am pleased to state that we now have on staff a young native person from Thunder Bay," and so on. We talked about two people. Are the two included in the 122 or are they add-ons?

Mr. Mills: We intend to fill them from the existing complement. We do not intend to go outside 122 to staff the office.

Mr. Van Horne: Any change has to be approved by the Board of Internal Economy.

Mr. Mills: Any change that exceeds 122.

Mr. Van Horne: I realize the charts are outdated, but I am assuming the same pattern would exist over the months. There is a vacancy rate of about eight per cent. Is that common?

Mr. Mills: Yes. In my experience, it is common over the last two fiscal years.

Mr. Van Horne: If those positions are budgeted, depending on how diligent you are in your replacement process, you might save some money.

Mr. Mills: That is the chief source.

Dr. Hill: We look very carefully at any vacancies before we replace them.

Mr. Van Horne: I have a couple of questions I would like to defer. I will pass to someone else.

Mr. Lane: Dr. Hill, I would like a couple of clarifications about your statement this morning. On page 4, in the second paragraph, you state, "We have saved \$39,000 by deciding not to hold hearings." Could you just tell me what hearings you are referring to?

Dr. Hill: Hearings across the province, when we went out to explain the role of the Ombudsman. We generally called on different cities, with two people going out and putting an ad in the paper stating that the Ombudsman was coming to town and that anyone who had a complaint could come to the meeting room and lodge that complaint.

We have discontinued the hearings because, after we analysed it, we found them to be most unprofitable in terms of people attending. Three people would come out to some. In the north particularly we would have nine people at a hearing. We sent staff people up there at a cost of hundreds and hundreds of dollars.

We have turned that around, Mr. Lane, and, as I said earlier, we are now getting ready. In October and November we are going on the road, but with a different concept, with the community meeting sort of concept, where the hearing and complaint are just part of it. That is where the saving comes. It was just an unprofitable venture.

Mr. Lane: I am glad to hear that because I certainly have to agree with you that those hearings were not productive.

Dr. Hill: We lost a lot of money.

Mr. Lane: I know the people in my area who went to see you were the chronic complainers who do not accept anyone's answer for anything, and there is just no end to that type of thing. I am glad to hear that was what you meant. I thought that was what you meant.

Dr. Hill: I had the staff do sort of a review of most of the hearings and the kinds of people who were coming out to them, and, as you said, they were the chronic complainers, and we were not getting anyone there for the most part.

Mr. Lane: The other clarification I would like is on page 9, the bottom paragraph. You are talking about the outreach program, including committee meetings and distribution of pamphlets, newsletters, etc. You say, "I intend to arrange community meetings by working in conjunction with local groups, and this will reduce expenditures for the meeting itself, rental of the hall, advertising, etc."

Again, I hope I am reading that correctly. Are you saying you are probably going to be having those meetings at the band office on a reserve; in other words, you are not going to be renting a hall to have a meeting?

Dr. Hill: For example, we are going to do a very wide sweep of reserves coming up this fall, and I certainly hope that we will be using the band council facilities and offices. That should be cost-free.

Mr. Lane: As long as it is nonpolitical. I can see the problem of using a political office, although I would--

Dr. Hill: No. I am thinking of band council offices and responsible representative community agencies that have offices.

Mr. Lane: Even municipal offices in the north are completely nonpolitical. I use them and my federal member uses them. He is of a different political persuasion than I am, so there is nothing political about it.

The people are happy to have the service and it saves money. People would probably not even go to the other facilities because it is not customary to go to a hall or some place, whereas the municipal office or the band office is where they go to do business.

Dr. Hill: I like to meet where the people are comfortable, and they will have a decision where we meet when we go north. We are just not going to rent a hotel somewhere. I am going to look that thing over very carefully. I would like to meet where people are comfortable and where I get some advice about where the people would like to meet.

Mr. Lane: I certainly appreciate all of your statements this morning, but those two things in particular stand out to me as real savings because they were sort of a dead loss.

Mr. Breithaupt: Mr. Chairman, I wanted to follow through on Mr. Lane's comment with respect to the travelling opportunities that have occurred to go to communities, to go to the library or wherever, and to advertise that those who have problems might attend and have them discussed.

Under your new program it would appear that, if you are going to be using other organizations to organize the meetings and the location for them, you are more likely then to deal with the members of the service club or whoever it might be on an educational basis.

11:50 a.m.

If you do that, though, you will not likely have the wider publicity for that meeting which might bring out a person who has a legitimate complaint, who is not one of the chronic complainers referred to, and who may not have had any other opportunity to contact the Ombudsman's office.

I realize you cannot run a system based on the one person who may show up in a community and accept that as value for the costs this whole program has developed. It seems to me, however, if you can tie in with the organization that might be sponsoring you some broader kind of community advertising, you might be able to accommodate both the results you apparently wish.

It appears obvious that you want, through an educational value, to tell the Lions Club, or whatever it may be, the functions of the office and talk about the prospects of resolving individual problems. If you are able to tie in some kind of opportunity for an individual to show up at the same time, the end result may be not only a net saving of money, if you do not have to arrange the location, do the advertising and cover at least those costs, but also it may bring out that contact with the individual you are trying to help who, for one reason or another, has not written or contacted the local member or done other things.

How do you see that balance? While it may avoid dealing with the two or three so-called chronic complainers, who may be dissatisfied with a result you have no opportunity to change, you want to contact and have a relationship with that one person who has a legitimate complaint and who takes the opportunity to show up that day.

Dr. Hill: Perhaps I can answer that this way, Mr. Breithaupt. We have in the past gone out to towns and put a little ad in the local paper and that is it. We may continue to do that because advertising in small newspapers is not very costly, but there is another mechanism we have totally failed to address and it may answer your question.

We have not put notices in the Lions Club newsletter, church bulletins, service club operations bulletins or the bulletins and newsletters of government agencies, and I have been instructing my staff to use and work with those community and government organizations that have publicity and materials and to piggyback on them.

Mr. Breithaupt: Most senior citizen groups or centres have a newsletter, and it is just as easy to visit there as it is to hire a hall.

Dr. Hill: Exactly. We have never done that. As part of developing a new kind of relation, I hope they will co-operate with us and let us piggyback and put our information in their brochures and newsletters. Similarly, I would like to insert material in some of the newspapers and things the native people have.

We have not used the community organizations' media facilities the way we should, and I intend to do that.

Mr. Breithaupt: You may also have the opportunity to deal much more with the open-line programs that are apparently a feature of modern radio most mornings in most communities. That is, as well, a chance to contact the group of people who tune in regularly and have opinions on most subjects. They may well want to contact you.

Dr. Hill: And that is low cost to us as far as I am concerned.

Mr. Breithaupt: I think most of them are delighted to have a theme for the day.

Dr. Hill: It is low-cost material and a way we can extend ourselves, but it does not negate the use of the media and the local newspapers. I still want to put ads in there as well.

Mr. MacQuarrie: I am certainly pleased with the approach the Ombudsman is taking to dealing with his office, mainly the conciliatory approach in dealing with government agencies, and also the emphasis you are putting on fiscal management and control.

I have had the feeling for some time that in the Ombudsman's office we sort of have an elephant by the tail in respect of the size of the operation and the amount of production, shall we say--the productivity. Can you tell me how your staff complement compares with complements in other jurisdictions in which ombudsmen operate, not only Canadian jurisdictions but also jurisdictions in Europe, Australia and New Zealand?

Dr. Hill: A very quick answer is that it is higher. I inherited a staff with a ratio higher than in most jurisdictions. Sometimes I try to explain it by saying we have nine million people in Ontario but they have 75 million in France.

Mr. MacQuarrie: There are about nine million in Sweden.

Dr. Hill: Exactly. Nine million in Sweden, so it is higher. On the other hand, I hope that by reallocating the resources and the staff people I have I can give better service to outlying and regional areas.

I cannot defend or argue about why it is so much higher than it is in England, Sweden, Germany or all the places I saw this summer. I can say that I can bloody well use the staff I have more effectively.

Mr. MacQuarrie: Fair enough.

Mr. Breithaupt: Recognizing that there are also perhaps differences between the responsibilities that are given to some offices and those given to yours.

Dr. Hill: I can also say it is going to be--my staff are not allowed to hear this--awfully difficult to get more staff.

Mr. Breithaupt: We can assure you of that.

Mr. MacQuarrie: We as members of the Legislature tend to look at your office as an office of allies, because in many instances we are dealing with the same sorts of problems. We in our own way, I suppose, are ombudsmen as well for our constituents, and our fight is with the bureaucracy. Over the past few years we have received quite a bit of assistance in the form of extra staff, constituency office staff and the rest of it to carry on these battles.

Mr. Cooke: Extra staff? When did we get extra staff?

Mr. MacQuarrie: So in dealing with the bureacracy, not only through your office but also through the members of the Legislature, the public of Ontario is fairly well looked after.

I wonder if I could turn to your remarks of today. You mentioned discussions with Bell Canada concerning a potential saving of \$250,000 over 10 years.

Dr. Hill: What page is that?

12 noon

Mr. MacQuarrie: Page 4. I wonder if at the time you had also looked into the possibility of acquiring your own PBX, which seems in offices of your size to be a very economical way of dealing with telecommunications, far more economical than Bell.

For instance, Mitel puts out a PBX that could handle an office of your size without very much problem at all. All you have to do is pay Bell for the lines. I find, and a lot of companies have found in dealing with Bell and in using Bell equipment, that it is sometimes more expensive than going the other route.

The other point is on page 6, where you indicate that you have also instituted a policy of placing all fast-action complaints that come from one complainant in a numbered folder. Do you encounter many what could be described as chronic complainers? Are there often more than 10 files or complaints a year from any one person?

Dr. Hill: Mrs. Meslin will answer that.

Mrs. Meslin: We certainly do.

Mr. MacQuarrie: You do?

Mrs. Meslin: Yes.

Mr. MacQuarrie: You have your regulars who come to the Ombudsman first?

Dr. Hill: We see them all the time. Mr. Mills will answer your original question on the PBX.

Mr. Mills: We are in the very early stages of exploring alternatives for telephone equipment. We received an unsolicited proposal from Bell Canada to install a Centrex-III system which would replace our Centrex-II equipment. We are also mindful of the economies to be achieved by buying equipment.

One of the difficulties in buying equipment is that one must then contract with someone to maintain the service. Given our present billing system, as long as we have what is called a straight set, the charge is for the line and not for the set. There would be no saving in buying equipment.

Bell provides a straight set with every line. The charge is for the line rather than the set. When you get into what are called six-button sets, then you pay for the set, you pay for the elimination and all the other good things.

I was only trying to make the point that we are examining alternatives, and we are in the very early stages of doing that.

Mr. MacQuarrie: Right. One of the government ministries was also looking into the prospects of going for a PBX system.

Mr. Mills: A recent article in the Star suggests residential users will save as a function of buying their own equipment, but commercial users will pay more. I would like to explore that.

Mr. MacQuarrie: I raised it as a question. I was interested in complaints because sometimes we have these habitual complainers.

I was also thinking about your computer capacity or word processing equipment. What type of word processing equipment are you using now?

Mr. Mills: Wang.

Mr. MacQuarrie: It has very limited computer capacity.

Mr. Mills: Yes.

Mr. MacQuarrie: What language are you using?

Mr. Mills: Wang Basic is what we use to program our in-progress system.

Mr. MacQuarrie: Is the University of Toronto switching off Basic?

Mr. Mills: At the University of Toronto we employ a language called Mark IV. It has decided to withdraw support for

Mark IV and tout, advocate, market or peddle SAS. This is where the costs will be incurred if we stick with U of T. With our own equipment we could program in virtually any language we choose.

Mr. MacQuarrie: You have indicated in one part of the statement you are investigating equipment with four firms and then on page 8 go on to say you have received a proposal from Wang to lease new equipment. Is there a contradiction there?

Mr. Mills: No. Wang initiated this proposal. Its representatives made it to us.

During the Provincial Auditor's examination of our office it was suggested we should have a proper feasibility study conducted. We approached the Ministry of Government Services to see if it would perform the service. It could not, but gave us the names of about half a dozen firms that could perform the feasibility study. We have contacted four of them, they made proposals and we shortlisted them. Mrs. Meslin and I have decided on one that seems best able to do what the Provincial Auditor wants us to do.

Mr. MacQuarrie: Will doing what the Provincial Auditor wants you to do also do everything you want to do?

Mrs. Meslin: I think you have misunderstood, Mr. MacQuarrie. There is a difference. The feasibility study is going to tell us what they believe our needs are. After we get the feasibility study and their recommendations as to various companies that can supply equipment, we will then tender those companies. It is stage 1 and stage 2. Wang may or may not be one of the companies suggested that should tender after the feasibility study.

Mr. MacQuarrie: What you are involved with now is a feasibility study?

Mrs. Meslin: That is right.

Mr. MacQuarrie: We will have a feasibility study performed. In this regard, four firms have been invited to make proposals.

Mrs. Meslin: Yes.

Mr. MacQuarrie: That is for the feasibility study.

Mrs. Meslin: Yes.

Mr. MacQuarrie: I am sorry. I misunderstood.

Mr. Hennessy: I am interested in the suggestion that you hold meetings in different areas. I would be in favour of holding them at the band offices or at the Ombudsman's office. I would not be in favour of holding them at city hall or the municipal offices where the politicians can enter into it.

If you have them at city hall, they can walk into city hall, take their seats and get into the process. It becomes a political

thing rather than listening to what the argument is from the people in regard to the problem.

If they want to attend a meeting at the band office, that is their prerogative. If they want to go to your office, that is their prerogative also. However, in all fairness, if you are listening to people who have complaints, you are interested in their being comfortable and they may not be comfortable in a political arena.

I am just saying that, if you are interested, there are other places to go. You can to a private hall where a person is comfortable.

People who are in the political game will recommend that you hold it in a political arena. The average person would not dare mention, "Where are we going to have it?" because he is a little shy about telling you where to hold a meeting.

To get something done, it would be much better if you have it at the band office, where the natives will be happy, or at the Ombudsman's office, where they will feel the security of the Ombudsman to some extent. You might get more dialogue back and forth. That is my suggestion.

Dr. Hill: Mr. Hennessy, let me assure you that I intend to use the same procedure I used when I was chairman of the human rights commission. When I was up north, I held my meetings on the reserves.

Mr. Hennessy: They would be happier and you would get more people out, because they are in their own confines.

Dr. Hill: They can also help us to organize them on the reserves. It is their property and their area. I will do the same as I did when I was previously with government. Those meetings will be held on the reserves.

Mr. Hennessy: At the Mission band at Thunder Bay there is a large hall where you can seat a lot of people.

Dr. Hill: My staff has already alerted me to the political nuances, so I am quite aware of it.

Mr. Hennessy: I like to see that people get fair hearings rather than somebody trying to get political marks from it.

Dr. Hill: I agree with that approach.

Mr. Chairman: Dr. Hill, in your remarks you mentioned complying with the Manual of Administration. We made a recommendation last year about bringing in the Provincial Auditor to review your policies. Has anything been done in that regard?

Dr. Hill: Yes. They have come in and reviewed them.

12:10 p.m.

Mr. Chairman: One thing I wanted to talk about, and we have talked about it in years gone by, is the time delay from the initial complaint to the point of bringing it to this committee. I thought there was one case, and there may been others, that we dealt with during these hearings. It was the superannuation problem. It seemed to me that it was brought to you in 1981 and did not get to this committee until 1984.

It did not seem to be that complex a problem, and I am just wondering about the time frame on it--the fact of the initial complaint in 1981 and its coming before this committee in 1984.

Dr. Hill: Are you referring to just that specific complaint or to a number of complaints?

Mr. Chairman: That one caught my eye because it did not seem to be that complex a situation.

Dr. Hill: In principle let me say this, and then maybe Ms. Bohnen may have something to say. I pulled together Linda Bohnen, Michael Zacks and Eleanor Meslin to do everything they possibly can to cut down the period of time involved in having complaints handled. I think that is an absolute priority and we hope to have some type of system in place to really cut into this whole problem of speed in handling complaints without sacrificing professional quality.

I hope I will have some kind of system in place by December. I know it is a problem, I acknowledge it as a problem and it is going to be rectified.

The other thing I would like to say is that if Linda would like to address that particular case, by all means do so. But I want to assure you that this is a worry of mine and that I am in to it.

Ms. Bohnen: I cannot comment today on the time it took for the investigation and so on to take place, but I do know that all the work on the case was completed very early in the previous fiscal year. Because Mr. Morand and Mr. McArdle did not choose to issue any special reports it meant there was a delay of a year before the case could be reported, and then I suppose it is almost six months until it comes to this committee.

You saw in the special report Dr. Hill issued that we have decided to issue special reports to avoid waiting time before it can come to the attention of this committee. I think one thing Dr. Hill will want to know before issuing future special reports of that type is realistically how frequently this committee will be able to convene to receive them.

We can issue all the special reports we like during the year but we are still going to have to wait until the next September for this committee to consider them.

Mr. Chairman: That answers my concern: you are addressing the issue of trying to speed up the process.

Of course, the other matter of when this committee will be sitting is perhaps something that we as a committee can be discussing and perhaps meeting with you to discuss too. We may indeed have to sit more frequently than we have in the past to try to help that process along.

We certainly are nowhere approaching the time allocation of three hours, but obviously we have exhausted the questioning and I am prepared to put the question.

Vote 1301 agreed to.

Mr. Chairman: Shall I report the estimates of the Office of the Ombudsman to the Legislature, without amendment?

Agreed.

Mr. Chairman: Thank you very much. Are you going to be here this afternoon, Dr. Hill, when we are dealing with correspondence from the public?

Dr. Hill: Yes. I have another presentation to make.

The committee recessed at 12:15 p.m.

SELECT COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1983-84
TUESDAY, SEPTEMBER 25, 1984
Afternoon sitting



SELECT COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Runciman, R. W. (Leeds PC)
Breithaupt, J. R. (Kitchener L)
Cooke, D. S. (Windsor-Riverside NDP)
Di Santo, O. (Downsview NDP)
Eakins, J. F. (Victoria-Haliburton L)
Hennessy, M. (Fort William PC)
Hodgson, W. (York North PC)
Lane, J. G. (Algoma-Manitoulin PC)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Sheppard, H. N. (Northumberland PC)
Van Horne, R. G. (London North L)

Clerk: Arnott, D.

Staff:

Bell, J., Counsel; with Shibley, Righton and McCutcheon
Madisso, M., Research Officer, Legislative Research Service

From the Office of the Ombudsman:

Bohnen, L., Director, Investigations
Hill, Dr. D. G., Ombudsman
Then, M. N., Director, Communications and Public Education

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, September 25, 1984

The committee resumed at 2:10 p.m. in committee room 1.

ANNUAL REPORT, OMBUDSMAN, 1983-84
(concluded)

Mr. Chairman: Could we come to order, please. I have been delaying, hoping the vice-chairman would arrive, because the first item of business is communications with the public and as members will recall, we established a subcommittee last year with the vice-chairman acting as chairman of that subcommittee to deal with communications with the public and we developed a policy in this regard. Mr. Van Horne, I will turn it over to you.

Mr. Van Horne: Thank you, Mr. Chairman. I look to the clerk to see if everyone has a copy of this. Do you know what the title number is?

Mr. Chairman: Section E in the binders.

Mr. Van Horne: Section E, binder number?

Mr. Chairman: Binder I, just in front of the estimates.

Mr. Van Horne: What we have not done, Mr. Chairman, as a committee, is to accept the paper that was put together by the former clerk, Mr. White, Principles and Procedures for Dealing with Communications with the Public. I think practically everyone present has been involved with the committee long enough to have seen this paper before. I would simply like to go over a page at a time and not read the whole, but highlight a couple of significant sections in each page.

The first page, Principles and Procedures, paragraph 3, simply states the obvious, that some of the communications we receive may disagree with the conclusions reached by the Ombudsman or may question the methods or motives of the Ombudsman's staff or allege wrongdoing or dereliction of duty by the Ombudsman's staff.

It says: "The committee's practice has been to review all communications with a view to deciding whether to pursue the matter in some detail and/or to invite the communicant to appear before the committee. In the vast majority of the cases which have come before it, the committee has declined to pursue the matters raised." It does not believe its function is to second guess the Ombudsman or to reinvestigate. I think that is the significant part of the first page.

On page 2: "The committee has decided that it will in appropriate circumstances hear from members of the public in person when, in the committee's opinion, it will assist it in the formulation of general rules for the guidance of the Ombudsman in

the exercise of his functions under the Ombudsman Act, or...assist it in reporting to the Legislature in accordance with its terms of reference."

The main thing here is found in the third paragraph. Essentially the key here is that "the matter raised in the communication is such that would assist the committee in carrying out any part of its terms of reference."

Going over to the principles on page 3, I think they are pretty straightforward. The committee would set its own procedures as long as they are within the order of reference as set out by the main committee and as long as they are in keeping with the provisions of the Ombudsman Act. The committee does not want to be a court of appeal and declines to act as a court of appeal. Each case is considered individually. No one has an automatic right to appear before the committee.

The fifth principle states that "all information, correspondence and reports exchanged between the communicant and the committee and between the Ombudsman and the communicant are shared between the committee and the Ombudsman." In other words, there is nothing that is kept from the Ombudsman's office nor is there any intent that would ever happen.

Item 6 says, "The committee reviews the documents supplied...but names are not used."

Item 7 says that we have attempted in our proceedings to date not to raise false hopes with any communicant, and we do not get involved with anything that is still under investigation in the Ombudsman's office.

I think the procedure is pretty straightforward. We have on occasion received phone calls but, as far as I know, the conclusion to all the phone calls received to date is that the communicant has been persuaded that he or she must put it in writing.

Once a letter is received it is acknowledged, and this is where we rely on the clerk's efficiency. Having acknowledged the letter, the clerk forwards it and any documentation with it to the Ombudsman.

Item 4 says that the clerk meets with the staff of the Ombudsman to discuss the situation. Names and identifying references are removed; this is item 5.

It is pretty straightforward stuff right through to the bottom of the page. I do not think we have had anything to date that has put us in a situation in which we have had to come back to the committee, although the chairman might correct me on that point.

In other words, I think the procedures we have established and followed have worked relatively well. The Ombudsman and his staff or the committee members may well have observations to make

on this, but once we finish today I would like to see the principles and procedures adopted.

Mr. Hodgson: How many cases would come to the subcommittee?

Mr. Van Horne: Do you have a summary there?

Clerk of the Committee: No, I do not.

Mr. Bell: Do you mean to date, Mr. Hodgson?

Mr. Hodgson: Yes.

Mr. Bell: In round numbers I would say 15 to 20.

Mr. Van Horne: In the last group of cases we reviewed in the spring, on May 17, eight cases were reviewed; there were a larger number at the meeting we had in the winter.

The cases are put together, by the way, in binder form for us. The diligence and expertise of the staff have been much appreciated.

Ms. Bohnen, would you say there were a dozen the first time around?

Ms. Bohnen: Yes, but overall over the years there have not been many more than 20. There have been some repeaters, but there have been about 20 different people.

Mr. Van Horne: I am sorry I do not have the number.

Mr. Hodgson: That is fine. It gives us an idea.

Mr. Chairman: Dr. Hill, do you have any comments on the procedures the committee has followed?

Dr. Hill: No. My staff and I have just chatted and we are quite satisfied with those procedures, Mr. Chairman. We agree wholeheartedly.

Mr. Chairman: Mr. Van Horne, I gather that you are looking for a motion from the committee to adopt the principles and procedures as you have outlined them.

Mr. Van Horne: Counsel has passed something on to me, the covering letter of--

Mr. Bell: No. Once we deal with that, I think there is the matter this morning--

Do you want me to chat with you? You have a communication that--I will chat with you.

Mr. Chairman: I do not think that is something we can discuss at this moment.

2:20 p.m.

Mr. Bell: No.

Mr. Van Horne: I am sorry for the confusion.

Mr. Chairman: My view on that matter, Mr. Van Horne, is that it should not go to the select committee, because I think the committee is in agreement as to what kind of approach to take with that piece of correspondence. It would only delay a response to the individual concerned.

Mr. Van Horne: I hope I did not say anything in the last five or 10 minutes to indicate that I wanted to see that pursued. I was trying to deal with Graham White's reference and that was the only--

Mr. Chairman: Mr. Lane has moved a motion that we adopt the principles and procedures as outlined for dealing with communications with the public.

Motion agreed to.

Mr. Chairman: That concludes the public version of our meetings. I gather, Dr. Hill, that you have some remarks you would like to make before we go in camera.

Dr. Hill: Yes, Mr. Chairman. I have another statement to make.

Mr. Lane: You are on a roll.

Dr. Hill: The statement I would like to submit will not take long. It is more or less a rejoinder to Mr. Warrington's comments. I think you will like the tone of it. I have a copy for each of you. It is only five pages long. Pardon me; it is seven pages.

Mr. Di Santo: Mr. Chairman, can I ask a question? It is aside from the estimates.

Mr. Chairman: We will let you do it.

Mr. Di Santo: I would like to ask Dr. Hill if his shelving of the hearings is a decision that will be permanent, or is it only for the time being?

Dr. Hill: Mr. Di Santo, when I discussed this matter earlier, I said the hearings were not productive in the sense that we had canvassed the province and asked my staff, and we were getting diminishing returns. We were getting three, six or nine people at the hearings for the most part. That was financially disastrous in terms of the amount of money we put into it.

Instead of hearings, I mentioned that people will still be able to complain. We will canvass the province, but they will be called community meetings in which the community will participate in the procedure. People will be told that they can complain at a

certain part of the meeting itself. It is trying to evolve a different structure.

That is what has happened to the hearings. The hearings were simply not productive and they were costing us more than I felt they should.

Mr. Di Santo: Are you planning any major investigations?

Dr. Hill: A whole lot of them, I guess--major investigations? Ms. Bohnen, are you planning any major investigations? There are quite a few significant investigations; I do not know what you mean by the word "major."

Do you want to speak to that?

Ms. Bohnen: I am not sure what you mean by the word "new." We are engaged in several major investigations at the moment.

Mr. Di Santo: But not on individual cases; for instance, the one Mr. Maloney did on Correctional Services.

Ms. Bohnen: We do not have anything of those proportions planned at the moment.

Dr. Hill: Does that answer your question?

Mr. Di Santo: Yes.

Dr. Hill: Do you want me to continue, Mr. Chairman?

Mr. Chairman: Yes, please.

Dr. Hill: This is my final statement to the committee. Over the past two weeks, a number of issues have been raised and questions asked about which I wanted a chance to comment before this committee adjourns.

First, let me say that I have been impressed and stimulated by this first select committee experience. I am a more knowledgeable Ombudsman from what I have learned here.

In my opening statement two weeks ago I talked about three systemic problems within the Workers' Compensation Board that contribute to the number of complaints my office receives and the adversarial process that has developed to resolve them.

These problems were, first, a reluctance on the part of the appeal board to accept expert independent medical evidence above the evidence of the board's own medical consultants; second, the board's apparent reluctance to be guided and influenced on legal issues by court cases; and third, the isolation of the board's decision-makers from the Ombudsman process and the select committee process.

I said it was important for the board and my office to address these problems together. I stated my commitment to

continue to pursue a positive working relationship with the board.

On September 10, 1984, your committee heard Mr. Warrington's statement of the Workers' Compensation Board's response to what I had said. He stated the board's view that its reliance on its own physicians' evidence on cause-effect relationship is consistent with the principle of relying on the best evidence.

He stated the board's concerns about injecting legal precedent into what is intended to be a nonadversarial process, in which cases are decided upon the real merit and justice. He expressed the board's concerns about the adverse consequences that might flow if appeal panels were obliged to meet with my investigators to discuss and justify their decisions.

The questions many of you asked Mr. Warrington and me demonstrated your committee's interest in my relationship with the Workers' Compensation Board and your interest in the board's processes and problems. It was also clear to me that while our points of view might differ, the Workers' Compensation Board shares my commitment to making the system work.

I am therefore very pleased to report to the committee on the outcome of a luncheon meeting that took place last Wednesday, September 19, between myself, my staff, Mr. Warrington and Mr. Emmink. At the meeting we were able to agree that, regardless of whether it is termed a systemic problem, many of the decisions appealed to the appeal board and many of the complaints made to the Ombudsman are based on conflicting medical opinions.

As a step towards resolving these complaints fairly and efficiently once they reach my office, we agreed to return to a system that had shown promise until it fell into disuse some months ago, that is, where my office and the board agree there is a conflict of medical opinion between treating physicians and the board's own medical experts, we will refer the case to an independent medical expert mutually agreeable to the board and to me.

Where such a referral is made, there would be agreement in advance that both parties would accept the independent expert's opinion as persuasive. While this procedure will not entirely resolve the systemic problem I referred to, in my view it is a good first step.

Second, we suggested the Workers' Compensation Board consult its own legal staff when cases under appeal raise legal issues. We felt it could be useful for the appeal board to have for its own use a memorandum prepared by a board solicitor summarizing the case law. It was envisioned that this would be useful where an appeal revolves around establishing an employment relationship or establishing the boundaries of the scope of employment, and when the interpretation of a section of the Workers' Compensation Act is at issue. Mr. Warrington and Mr. Emmink undertook to take this suggestion back to the board to see if it can be implemented.

Finally, there is the issue of my contact with the commissioners of the appeal board. This was a subject that

prompted some members of your committee to express concern about tampering with the appeal board prior to decisions being made. I did my best to persuade you that this is not what I had in mind. At the same time I recognize the pressures of time on the commissioners and their justifiable, indeed commendable guardianship of their independence from improper influences.

2:30 p.m.

I firmly believe that if my relationship with the appeal board is to become more fruitful, then the commissioners should play a role in working out this new relationship. I therefore asked Mr. Warrington and Mr. Emmink to try to arrange a meeting between the commissioners and myself at which we could discuss our various concerns and together develop a process we all could live with and benefit from. Mr. Emmink and Mr. Warrington were very receptive to this idea and undertook to do their best to try to arrange such a meeting in the very near future.

I think you will agree that this meeting was exceedingly fruitful. I think it is a remarkable testimony to the board's spirit of co-operation and in particular to Mr. Emmink and Mr. Warrington's commitment to co-operation that we were able to accomplish these tasks during the select committee proceedings.

The Workers' Compensation Board is not the only governmental organization in which I have observed recurring systemic problems. I mentioned in my opening statement my intention to meet with senior officials of the Ministry of Community and Social Services to discuss systemic or recurring problems with the provincial family benefits program. We are in contact with Mr. McDonald to arrange that meeting very shortly.

A member of this committee, Mr. Philip, asked me to consider conducting periodic inspections or "Ombudsman audits" of all ministries and other governmental organizations, much as the Provincial Auditor conducts periodic comprehensive audits. As much as this might be an attractive idea to me, even a tempting one, I want to be realistic in setting goals and priorities.

Assuming that any jurisdictional problem can be overcome, for my statutory mandate is to investigate complaints, I want to concentrate on those programs or agencies where we know there are problems. Please do not take from this that I will shy away from taking on major projects, but in choosing projects I will be guided by my experience and the experience of my predecessors.

I fully intend to share the results of these investigations with this committee through my reports. Publicizing our work and its results is part of ombudsmanship, in my view. The public ought to know the results of what we do, not just how many investigations we conduct and how long it takes to do them.

This relates also to the code of administrative rights, and a few questions were raised here. It was my intention that the code would give the people of Ontario simply an idea of how I, as Ombudsman, believe they are entitled to treatment by civil servants.

Likewise, I wanted to give civil servants an idea of my expectations of them. The question has been asked of how I relate the code of administrative rights to the Ombudsman Act. I must say that I see no difficulty here whatsoever. Every complaint that we investigate must and will be considered in terms of the Ombudsman Act. If there is ever a conflict between a general principle contained in the code and a section of the Ombudsman Act--and I cannot imagine how there could be--then I will be bound by the act, of course.

However, for me the code is at least an affirmation of the ombudsman principles--a guide, a moral lever.

Finally, let me say that I look forward to working with your committee over the coming years.

Mr. Chairman: I just wonder if your statement may have prompted a few questions, if you would be prepared to answer them at this time.

Dr. Hill: I will try.

Mr. Di Santo: I have just one single question. You said you are going to refer cases where there is conflicting medical evidence to independent doctors.

Dr. Hill: Mutually agreed upon.

Mr. Di Santo: Do you have a list of all the consultants, part-time or full-time, of the board?

Dr. Hill: Yes, we have a list of the consultants, part-time and full-time, of the board.

Ms. Bohnen: Yes. Are you concerned that a referral might be made to one of them?

Mr. Di Santo: Exactly.

Ms. Bohnen: Before this procedure fell into disuse, there was a list of independent consultants which I believe had been drawn up with the assistance of the Ontario Medical Association. At the time we vetted the list, I believe there were some doctors we had proposed that the board was not happy with and vice versa, but we would certainly make sure that none of the doctors on the list was a board consultant.

Mr. Di Santo: But you said doctors may go back and forth from independent to consultant and from consultant to independent.

Ms. Bohnen: Yes.

Mr. Chairman: Mr. Bell, did you have something?

Mr. Bell: Dr. Hill, between March 31, or I guess your special report, and now, have you had any additional Workers' Compensation Board "recommendation-denied" cases?

Ms. Bohnen: None has been reported yet to the Premier (Mr. Davis), but there is at least one and possibly one or two more that are approaching that stage.

Mr. Bell: Do they involve conflicting medical opinions? If they do, would you consider implementing the old procedure in regard to those?

Ms. Bohnen: We will consider it. I do not believe they do involve conflicting medical opinion, but we could consider it.

Mr. Bell: For an obvious reason. If they are not resolved and come before this committee, there will be the same wrestling match we had this time.

Dr. Hill: We will look at that, Mr. Bell.

Mr. Van Horne: Those of us who have medical schools and teaching hospitals in our communities are going to be awfully tempted to send you the names of some very good orthopaedic people.

Ms. Bohnen: Please do.

Dr. Hill: Talk about it with the board.

Mr. Van Horne: I was interested in one little comment you had on sharing the results, saying the public ought to know the results of what you do, and so on. Then you talk about your reports. We have your annual report, but are you intending to expand on this in such a way that your results will be publicized, or have you any other publication tools in mind?

Dr. Hill: That will come out four times a year. Anything we talk about, of course, will be anonymized and will not be related to any particular ministry because of the confidentiality provisions. We will be citing and talking about cases, but they will be anonymized and it will come out four times a year.

Mr. Van Horne: Basically in this format.

Dr. Hill: That will be the format.

Mr. MacQuarrie: What other type of brochures are you planning to put out?

Dr. Hill: We have another brochure, Mr. MacQuarrie, that is coming out. It is a general information brochure on the Ombudsman's office, where the offices are located and how you file a complaint. It is strictly informational.

Mr. MacQuarrie: How many copies of that brochure are you putting out?

Dr. Hill: We will put out 50,000 copies.

Mr. MacQuarrie: How many copies of the newsletters you put out will there be?

Dr. Hill: About 25,000. I should explain that they go to ombudsmen in other provinces; they will be used at our public meetings; they will go to the International Ombudsman Institute and to those contacts in Europe where we have worked with international ombudsmen.

Mr. MacQuarrie: Do you put them in public libraries or other places where they would be seen?

Dr. Hill: Yes, they will be used in schools and libraries. We are developing a major contact list for that use, to all the members, of course, and to--

Mr. Van Horne: At their constituency offices.

Dr. Hill: Exactly. So they are broadly based. They will go to schools and universities too.

Mr. MacQuarrie: I noticed this morning you had a figure of something like \$38,000 for publicity, including the preparation of these pamphlets.

Dr. Hill: That amount is to cover that.

Mr. Then: That includes postage and it also includes 10 language fact sheets, which are a condensed version of the pamphlet. The pamphlet with the 50,000 distribution will be a bilingual pamphlet in French and the one-page fact sheet printouts will be in 10 different languages. The \$38,000 is anticipated to cover postage, distribution and publication of all the print materials to the end of this fiscal year.

Mr. MacQuarrie: Until the end of the fiscal year.

Dr. Hill: Also in answer Mr. MacQuarrie's question, I had asked for an amendment that is very important to me, that henceforth the Ombudsman must, in his work, account for his educational programs and the kind of educational programs he is creating to inform the public of their rights. If this amendment gets through, it will retroactively support the kind of work we are trying to do right now.

Mr. Chairman: Thank you, Dr. Hill, on behalf of the committee. We have very much appreciated your involvement in the hearings. You made a commitment early on in the game that you would attend extensively and you have kept that commitment. I know it is appreciated by the committee and I think we also appreciate the approach taken by your staff. I know those of us who have been around for a few years remember approaches other than the kind that took place during the past few weeks and it is, again, very much appreciated. We are looking forward to this kind of co-operative spirit continuing in the years ahead.

Dr. Hill: For our part, we intend to continue it, Mr. Chairman. Thank you very much.

The committee continued in camera at 2:42 p.m.

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Select Committee on the Ombudsman

Estimates, Office of the Ombudsman

Fourth Session, 32nd Parliament

Tuesday, September 25, 1984

Speaker: Honourable John M. Turner

Clerk: Roderick Lewis, QC

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LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON THE OMBUDSMAN

Tuesday, September 25, 1984

The committee met at 10:15 a.m. in committee room 1.

After other business:

ESTIMATES, OFFICE OF THE
OMBUDSMAN

Mr. Chairman: The first matter we are going to deal with in open session this morning is the estimates of the Office of the Ombudsman. Dr. Hill, do you have any opening remarks you would like to make?

Dr. Hill: Yes, I have. I will distribute them to you and read them. You can read them along with me. I have an opening statement that will take just a few minutes to read. I hope it has been distributed to all members of the select committee.

Mr. Chairman: I think everyone has a copy now.

On vote 1301, Office of the Ombudsman program:

Dr. Hill: Gentlemen, before beginning our discussion on the estimates, I would like to make some further remarks regarding my fiscal philosophy and future plans. I will also be answering the questions you raise in response to my opening remarks.

As you know, the Ombudsman's primary function is to investigate complaints against administrative decisions and actions of officials of the government and its agencies. To carry out this mandate, I need a competent staff and an adequate budget. But that is not all; to use staff and funds economically and efficiently, I must have a sound system of fiscal and management control.

My executive director and my controller have the primary responsibility for developing adequate management controls to ensure due regard for the economy, efficiency and effectiveness of the services we provide. These include:

1. A planning and budgetary process that involves all levels of management from the beginning of the budgetary planning process to their accountability for achieving results. Such a process would encompass an in-depth study of cost efficiencies and the reallocation of savings to pay for new programs; the development of a management information system that provides

necessary information on staff utilization and complaint file processing in order to determine whether management's budget decisions are producing cost-efficient results; and adoption of the Ontario Manual of Administration as a guideline for compliance with policies and procedures.

2. An overall examination of complaint file processing to assure me our procedures promote efficient and effective processing of all files.

3. An in-depth review of significant expenditures such as the computerized data and word processing system, the regional and satellite offices, staffing, travel and new public education programs.

The details of the above initiatives as they relate to our estimates discussions will be outlined later. However, it is important to point out that I have already undertaken a number of steps, including changes in senior personnel and changes in policies and procedures, to achieve cost efficiencies. For example:

1. By the end of this fiscal year, we will have reduced our expenditures for the rental of office space in Ottawa by \$7,200. This was achieved by moving to less expensive but equally accessible premises.

2. Our current budget provided sufficient funds to lease six vehicles. In June the leases on five of these vehicles expired, and we decided to buy two vehicles with the money made available by discontinuing the leases. These two vehicles are expected to last for three years, and we should therefore not require any funds for this purpose during the next two fiscal years. We have also saved the operating costs on the three vehicles we did not lease during the current fiscal year.

3. We have offered to sublet space in our building to Mr. Sidney Linden, the public complaints commissioner. If he accepts our offer, we will save \$4,000 per year on our rental costs.

4. We have saved \$39,000 by deciding not to hold hearings. This amount has been transferred to provide some of the funds for the operation of the newly established communications and public education directorate.

5. We are currently examining a proposal provided to us by Bell Canada to reorganize and update our present switchboard equipment. If we

accept Bell's proposal, we could save \$250,000 over 10 years. However, we are carefully studying all the cost implications of the proposal.

The problems of managing resources which confront me as Ombudsman in delivering service to Ontarians are similar to the problems faced by a deputy minister whose ministry delivers service to the same clientele. Therefore, I believe it is appropriate for my office to adopt management practices similar to those used by the ministries, even though the Ombudsman's office is not legally required to do so.

We have started adopting the sound management practices I previously mentioned. The planning and budgeting process for the next fiscal year has already begun. Our senior management, including the executive director, controller, directors and manager of administration, will be meeting to examine our previous budgets and discuss their resource needs for next year. Much of the philosophy for our planning and budgeting practices will be based on the government's Ontario public service management series booklet, *Operational Planning, Budgeting and Reporting Processes*.

In specific terms, the office has adopted the concept of management by results. This concept places equal emphasis on results and resources and is premised on the monitoring of results. MBR will provide a formal record of expected results against which to measure actual performance expressed in terms of client-complainant-benefits.

As Mrs. Meslin indicated in her opening remarks to the committee, the statistics and records committee has already developed a number of new procedures for recording the status of each file.

Fast action complaints are now being coded in the same way as complaints in files to provide us with better disposition statistics for reporting purposes. We have also instituted the policy of placing all fast action complaints which come from one complainant in a numbered folder. This enables us to build a history profile for the complainant, which in turn permits better control and therefore better service to the public.

In addition, we have instituted a pilot project to help speed up the post-case conference process that, if successful, could significantly reduce the amount of time spent.

During our analysis of the effectiveness and cost efficiency of both our computer and word processing systems, we have been considering various alternatives. These include purchasing or leasing equipment; the integration of the present

information systems into a common data base; and the appropriateness of continuing to use the University of Toronto's facilities. Before any action is taken, we will have a feasibility study performed. In this regard, four firms have been invited to make proposals.

Before going any further, I would like to give you some of our past computer costs and some preliminary estimates of the costs involved in bringing our data processing systems completely in-house.

11 a.m.

Currently, we rent word processing equipment which has limited data processing capabilities. These capabilities do permit us to operate a file tracking system for open files but do not permit us to maintain statistics on our closed files. For this latter purpose, we are using the University of Toronto's computer facilities. You will appreciate this is costly now, and will become extremely costly in future. The figures on page 7 illustrate this point clearly, and you may look at the figures in the third paragraph.

If the costs we have experienced up until August 31 continue, we will have spent \$185,000 in this one area by March 31, 1985. This represents an increase of 52 per cent in costs. We have therefore examined alternative approaches carefully.

The increased costs charged by the university are only one problem in continuing to use their facilities. The university has decided not to support certain programming languages which we use at present. Because of this, our processing is delayed and errors occur.

The university's decision will also force us to restructure the data we store at its facility so that it can be processed by the new languages which it has decided to employ. The one-time cost of this conversion has been estimated at \$150,000. As long as we process our data at the university, we are liable to incur such costs. Clearly, we would not be vulnerable to this sort of change and additional expense if we did our own data processing and had complete control over the program languages used.

The firm from which we rent our word processing equipment has made a proposal to lease us new equipment which has all the data processing and word processing capabilities we require at present or which we can perceive requiring. Leases are available for three-, four- and five-year periods, the latter being the least expensive at \$148,728.

If we assume that the university's rates and data entry rates will increase by five per cent per

year over the next five years, then we could face a cost of \$200,000, money which could well be applied towards the cost of leasing the new equipment.

Finally, a very significant advantage of the new proposal is that the equipment would permit us to transmit and receive documents, such as letters to and from our regional offices. Thus another means of communicating rapidly and precisely with our regional offices would become available to us. In addition, our regional offices would acquire a limited amount of word processing capability, which they presently lack.

The committee has inquired about our regional offices and the costs of our outreach programs. First, the estimated costs of establishing the two satellite offices in Kenora and Timmins, including the salaries of two full-time employees, are \$81,000.

The outreach programs include community meetings and the distribution of pamphlets, newsletters, etc. As I outlined in my opening remarks, I intend to arrange community meetings by working in conjunction with local groups. This will reduce expenditures for the meeting itself—rental of the hall, advertising, etc. We estimate that printing and distribution costs for pamphlets and newsletters will be \$36,000 this fiscal year.

In accordance with Manual of Administration guidelines, travel by employees outside the province or the country has been stopped without the prior approval of the executive director and the ultimate approval of the Ombudsman. In addition, closer scrutiny of all travel expenses has been initiated.

In terms of staffing efficiencies, there are 122 employees on staff at present. This number includes six articling students, who are not counted for complement purposes, and six contract, noncomplement staff.

As you know, I have made the positions of executive assistant, hearings co-ordinator and hearings officer redundant at an annual saving of \$91,530. Although I have created a new directorate of public education and communications, I have simply transferred the three employees who were already on staff to serve in the new directorate and have not hired replacements for their former positions. I have hired only one new full-time staff member for this directorate.

As for the new positions of chief, training and staff development, and chief, regional planning and development, both positions were filled by employees already on staff. I do not intend to fill the vacant position of one of them and I am still

considering whether to fill the other vacancy. I estimate all this will represent savings in salaries and employee benefits of \$198,551. I intend to use this amount to finance my satellite offices and other programs.

I hope my remarks have helped to answer your estimate-related questions. To sum up, I should point out that since my appointment I have initiated overall savings of approximately \$206,000 on an annual basis. There will undoubtedly be fuller opportunities to make additional savings and we will consider each opportunity carefully. I have described to this committee the many initiatives I wish to take. I hope that after hearing of the steps I have taken already in the direction of fiscal responsibility, you will support my future plans. Gentlemen, I thank you.

Mr. Van Horne: Mr. Chairman, I appreciate the effort the Ombudsman and his staff have gone to in presenting this to us. Another observation is that since this is a first for this committee, I think we should be mindful of how we arrived here. The estimates have not been a responsibility of this committee to my recollection up to this point; yet we did run into circumstances a year or so back that created problems for us as a committee.

As I recall it, our concern a year or so ago was that the Ombudsman's task be done as effectively and efficiently as possible. In so far as the dollars and cents of the operation are concerned, I think most committee members were of the view that the Board of Internal Economy had a responsibility in that area and that this committee should be mindful of that and not get itself too involved with the review of dollars and cents. Yet here we are, looking at dollars and cents. Unless I have misunderstood the past history, I would say we have to be mindful, as we look at these things, to look at them in terms of the job being done effectively and efficiently.

Having said that and having had the opportunity to hear the Ombudsman's comments, I would like to direct a couple of questions in the area of staffing and then in the area of procedures, particularly as they relate to the electronic capacity of the service he is looking to expand.

We all had a concern a year or so back that the size of the office staff was maximal. The Ombudsman has indicated to us that he is trying to fit in an outreach program and trying to be cost-efficient in his Toronto operation. I wonder if he could indicate to us the numbers that existed in total last year and the numbers as he sees them now and give us some indication of any shift.

Are the numbers the same? Has there been any shift in terms of the number in the Toronto complement versus the regional office concept? How many are involved in that?

11:10 a.m.

Mr. Chairman: Mr. Van Horne, Dr. Hill, I just wonder if I could interject. If Mr. Van Horne would continue with his opening remarks and questions, you could simply take note of them. Then when the New Democratic Party critic has made his comments, you can respond to both of them following completion of that.

Mr. Van Horne: I do not have a prepared text. I simply want to reiterate the two themes we have to keep in mind, the effectiveness and the efficiency of the office. If you want to leave specific questions until later, I will be glad to do that.

Mr. Chairman: The critic for the New Democratic Party has indicated he has a concern about time; that was the only point.

Mr. Philip: My problem is that I am in another committee. I have come in to make a few remarks.

Mr. Van Horne: I do not think our remarks here have to be extensive. I will be quite happy to leave the specifics until later.

Mr. Philip: I guess this is the first set of estimates I have ever attended as a critic in which I have to start by saying, "You are doing a good job." I have little to criticize so far.

I am pleased that you are implementing many of the things for which I and other people on this committee have asked for many years. I have said off the record, and maybe I should say it on the record, that if you keep on this way you may well become known as one of the great ombudsmen of the world. I look forward to being very proud when you are so recognized, perhaps in a few years' time.

I would like to explore a few directions with you, because there is no sense recycling the past or simply tooting your horn for you as to the improvements. We have already gone over that. We are delighted they are happening and that you are doing such a good job.

I would like to deal with a few philosophical areas. One of the things that Friedmann, who I think is one of the great ombudsmen, dealt with in a paper I know you have read is that in a cabinet-controlled jurisdiction it is the bureaucracy that drafts legislation. Often the bureaucracy has a vested interest and is in a conflict of interest position. The bureaucrats naturally limit

the power of an ombudsman while at the same time extending their discretionary powers.

Friedmann points out that in the United States there is a different system. There the legislators and their staffs, rather than the bureaucracy, draft the legislation. I think that is an important distinction. When you are coming at it from two different points of view or interest, it creates the possibility of a conflict.

The problem that then arises is, what is the role of the Ombudsman in dealing with that conflict? Is there something in the process that you feel you should recommend to government which would at least correct what Friedmann sees is a basic conflict of interest in the bureaucracy? Am I too airy-fairy in asking that question?

Dr. Hill: I was immediately swamped by administrative problems and I admit I have not addressed myself to that question, nor have I thought about it at great length.

I certainly feel it is the Ombudsman's role to be very much involved in the drafting of the legislation and to be guided by the advice of his staff, not by civil service staff but by the staff in the Ombudsman's office, and to have the opportunity to vet it with the legislators as well. I do not see where they are mutually exclusive in that sense. I cannot see the mutual exclusivity of the two.

Mr. Philip: You have a couple of problems. One is the public servant who uses discretion aggressively; the other is what Dr. Karl Friedmann calls administrative laziness, in which he does not use discretion at all and in fact relies, rather, on the book.

You have addressed yourself to the latter in a number of the cases you have dealt with. You have said, for example, as I recall in one of the Ombudsman's cases on workers' compensation: "Here is a guy," the hearing officer, "who is technically right in saying, 'The applicant and his advocate did not ask for that'; he passed the decision only on what was asked for and, therefore, if the applicant wants the other, he can start at the other end of the line and work it through. We, on the other hand, have examined it and said, 'A little discretion should have been used by the arbitrator, who should have said, 'Other things are open, and we can recommend this.'"

That is a case, as I see it, in which you have said there is a failure of the bureaucracy to use adequate discretion and that the justice of the case—I think those were your words—should have been exercised.

I am asking you whether you have examined where discretion has been abused and whether there is some system—or some rules, if you want—of administrative behaviour that we can develop to the point at which we can say, "Discretion has been abused."

There is an increasing possibility of the other problem I cited, of the overuse of discretion. As society becomes more and more complicated and as legislation comes in that is more and more vague and that gives the bureaucratic system more discretion than it did in simpler days when you could legislate more specifically, what do you see as your role in coming to grips with that? Is there a process? Is there a code? Is there something that has to be developed on maladministration that can deal with the overuse or the misuse of discretion?

Dr. Hill: As I said before, we have been looking at the question of discretion and in many cases I have been involved in it. I have not developed rules as such—unless you are looking at my code of administrative guidelines—to deal with it and I have not developed mechanisms to deal with this question of discretion. It is something in which we have to gain a bit more experience before we talk about developing rules and guidelines. It can be questioned, and I am trying to question it when I think it is possible; but in respect of rules and guidelines, no, that should still be looked at and developed.

Mr. Philip: In Quebec the courts cannot review discretion, they can review only whether the public servant has used discretion that was not open to him under an act. Do you feel that the courts should have the right to review this, or should it be the role of the Ombudsman?

Dr. Hill: Again you have me at a point where I would like to give this more thought. I am of the belief generally that the courts have a right to review anything and should, indeed, review things, but I cannot state a position on this yet. I would have to give it a bit more thought.

Mr. Philip: One of the positions taken by Bauer in that system, which I found intriguing—and I do not want to make a television star out of you—in the TV show that dealt with the role of an ombudsman, *A Case for the Ombudsman*, a TV series in which there is a re-enactment of typical Ombudsman cases—

Dr. Hill: Is this the series that used to be on the Canadian Broadcasting Corp.?

11:20 a.m.

Mr. Philip: No, this was the one in Germany, was it not? Dr. Franz Bauer, the Ombudsman in Volksanwalt, Austria.

One of the things we found in northern Ontario, and I think we find the same thing in constituents who come to me, is they really do not know what the role of the Ombudsman is. I have examined some of the interesting printed material you are turning out, but I think the average citizen still does not know what an ombudsman is or what his role is.

I am wondering whether you agree that perhaps that kind of format or some kind of media show that would act out the drama of an ombudsman solving problems would be useful. Would that be a way of showing, one, that the Ombudsman has some power and influence; and two, the kinds of problems the Ombudsman can deal with?

Dr. Hill: I think it could be useful. Of course, that could be a technique and a way to do it, but I have another way in which I am very much interested, particularly in the north. I mentioned this earlier in the statement I made at the beginning of our meetings.

The only way the residents in the north and in other parts of Ontario will have a better understanding of the role of the Ombudsman is to develop with us community programs and community education programs. In other words, I want to see them involved in the setting up of the conferences, the setting up of the discussions, the setting up of the educational meetings, instead of having an overlay.

The problem, as I mentioned earlier, is that government operations and private organizations have too frequently gone into trying to educate the public about the role of a ministry, of the Ontario Human Rights Commission or of the Ombudsman by lecturing and talking to people. My theory is you have to do it the reverse way. You have to sit down with the people and plan together the programs, be it television, radio, media, conferences or seminars, have them plan with you the educational things they will do. That way, they will be able to transmit it back in a much better form to their own constituency.

I am driving at a joint involvement with community groups instead of a straight educational, media or whatever kind of program. I think it is a better approach.

Mr. Philip: So you see a media component?

Dr. Hill: Certainly.

Mr. Philip: It strikes me when you hold community meetings, and I do not think my community is different from any other—indeed, when I worked for the Ontario Federation of Agriculture as director of leadership training, we had meetings all over the province. The fact is

that no matter how well you advertise things, you get only a small percentage. They may be more dedicated, they may be more interested, or they may simply be the ones who had nothing else to do that night, but you—

Dr. Hill: I like to share the media with the constituents in the area. In other words, if I am involved in a media program, if it is possible to do so I like to share the media with the parties involved. The native people sit down with me on a panel or in a discussion group. They ask me questions and I am not lecturing to them. It is the lecturing format I am trying to avoid.

Mr. Philip: In certain jurisdictions the ombudsman has the power to recommend that in cases where procedures have been followed and there is no fault in procedure, there are still hardship cases where justice is not being served although procedures have not been violated. For example, a person owning an expropriated house may receive what it is worth, but may not receive sufficient funds to replace it.

Do you see that as a kind of discretion the Ombudsman should have in this province, and would you use that kind of discretion? You may say there is no fault in procedure, technically there may not be any injustice, but the merits of the case say there is a hardship element and there should be compensation for the hardship element.

Dr. Hill: My answer is yes, I would try to follow that. If the procedures had not been violated I would look to the same kinds of procedures I tried to use in the human rights commission informally to get some type of adjustment or settlement or assistance to the party that was aggrieved, irrespective of whether we had jurisdiction or not. Does that answer your question?

Mr. Philip: Do you have any cases where that has happened?

Dr. Hill: I cannot tell you immediately.

Do we have a case of that nature, where we have informally been able to assist a party and resolve a situation on a matter that did not have a formal component to it?

I cannot give you an exact example of it.

Ms. Bohnen: First, Mr. Philip, we do consider cases where, although the procedures have been followed on the unique circumstances of the particular complainant or his case, the Ombudsman might, nevertheless, decide that something above and beyond what is called for by those procedures or the law is reasonable.

The procedures that have been established may not suit a particular complainant's case or needs, and I do not think the Ombudsman would feel he cannot support a complaint or try to achieve the result for someone just because technically all the rules and procedures have been followed in his case.

Certainly all of the investigators and lawyers, as well as the Ombudsman, try to conciliate and negotiate settlements of cases, even where technically no wrong has been done, because it is in the interests of the public servants, the ministries and the complainants to do that.

Mr. Philip: Would we then at any time see an actual case come before us in which you say: "This workers' compensation person has been awarded what he is entitled to under the act. However, we feel that in this case the hardship to this man and his family is such that there should be an additional award based on compassion or based on hardship"? Can we envision seeing something like that happening?

Ms. Bohnen: To put it in a slightly different way, you have already seen a case like that. If you recall, last year there was a case concerning attendants' allowances where the board had followed its policy on providing money for an attendant to a worker who had suffered a head injury. The Ombudsman felt that the policy itself did not provide this person with the care that he required realistically and he recommended something in addition to the board's policy.

He also recommended that the policy be reconsidered, but that is an example of where we certainly do go beyond what the board's, or any ministry's, actual policies provide.

Dr. Hill: Indeed, I think that is the role of an Ombudsman, and my short answer to that is, yes. You have to deal with the specific case, but in terms of what I consider the classical role of the Ombudsman, I would say, yes. That is my short answer.

Mr. Philip: One of the components running throughout your various speeches and comments is the role you see as a conciliator, and you have a good record of that at the human rights commission and so forth. In addition to that, I am sure you would admit that if you go across the world of ombudsmen there are certain ombudsmen who have a fairly high profile and certain others who are perhaps closer to the model of conciliation and maybe even a form of arbitration.

11:30 a.m.

One of the arguments made by people like Friedmann, who receive a lot of press coverage,

is that publicity is the greatest security in correcting injustice. I am wondering if you have worked out in your mind whether there are types of cases where it becomes important for you, if you are going to change the system, to lay down and put aside the conciliator role and use the hammer and the publicity role in order to achieve your objectives. Do you see this happening? What are the kinds of instances where you would see yourself taking a more active, perhaps public role, rather than just correcting an injustice?

Dr. Hill: One of my amendments, Mr. Philip, provides for me, at least if we want to, to be able to make a report or go to the public if I need to, as other ombudsmen in other jurisdictions have been able to do, and use that medium, but not going directly to the press, because I think that can harm the conciliatory process. It hardens the conciliatory process. When one is going back and forth trying to get the rights with the complainant straightened out, I do not think that is a correct approach. I think the way one should go is by special reports and by spelling out to the public through that mechanism. I want that as an amendment to rectify some of the things you have mentioned.

Mr. Philip: You are saying that will be an amendment?

Dr. Hill: I am proposing it.

Mr. Philip: You are proposing it. While we are talking about possible amendments, in France the ombudsman can intervene when other processes are taking too long. Do you see that as part of the powers you want to exercise?

Dr. Hill: Intervene through an amendment?

Mr. Philip: In the middle of a process. There may well not be an injustice other than the fact that a particular process is taking too long.

Dr. Hill: I would like to do that anyhow. I do not think I have any legal mechanism. We have not mentioned anything in our amendments to handle this, but I think we would do that anyway. In other words, I can write to that deputy, or even write to the minister, or talk to the minister and get that corrected if I want to do it that way.

Mr. Zacks: We could do that now. If there is a complaint that a specific tribunal is delaying or the process is taking too long, that is a valid complaint.

Mr. Philip: You do not need any changes then, to the act, in order to do that.

Mr. Zacks: Not for that. If you are saying that the complaint is one of delay and too much bureaucracy involved in some sort of hearing, we

could investigate that issue of delay. But if the question is whether we could investigate the same subject matter that the tribunal is considering, the answer is no, we cannot.

Mr. Philip: What happens if the delay continues? Do you have any way of intervening at that point and doing the investigation?

Mr. Zacks: Not if it is a statutory right of appeal. Theoretically, I suppose if the matter was before the courts, we could investigate the same subject matter. Whether we would get the co-operation, or whether we should investigate the co-operation from the ministry, is another issue because there is a principle that rejects multiplicitous proceedings.

Mr. Philip: It is my feeling, for example, that in the case of the Housing and Urban Development Association of Canada home warranty program, it almost seems as though they deliberately delay in the hope that people will get tired, pay for their repairs themselves and go away. If you look at the procedures of the HUDAC home warranty program and the countless letters, and I can take you through case after case after case, it is a system of justice denied by what can only be described in my experience as almost planned delays.

Under your system you cannot intervene and say, "Look, it has taken six months to get an investigator out there and it has taken 10 weeks for HUDAC to write to the developer and it has taken another 10 weeks for the developer to respond." Do you have a system in place that—

Mr. Zacks: If we had jurisdiction over HUDAC—

Mr. Philip: Which is a debate.

Mr. Zacks: Which is a debate; that is right—we could investigate the process, if there were allegations of delay.

Mr. Philip: Are there other quasi-tribunals such as HUDAC over which you feel you should have investigatory power?

Mr. Zacks: I think there are not any that we do not have under provincial legislation. I cannot think of one off the top of my head that we do not investigate or that we cannot. The number of complaints vary of course. HUDAC really is not structured like a tribunal with an investigative process. Although they hold hearings, they make decisions internally and have appeals from their decisions to the Commercial Registration Appeal Tribunal.

Somebody might correct me, but I do not think they hold hearings within their own process the way the Ontario Municipal Board or the

Workers' Compensation Board holds a hearing. You would make a claim to them and they would consider the merits of the claim and award damages or not; then you have a right to appeal depending on what they do. I am not sure that really answers your question specifically.

Mr. Philip: I would like to hear Dr. Hill's answer.

Dr. Hill: I would like to say something about delays generally. As far as I am concerned, one of the major areas of delay is the responses from the ministry to our correspondence, letters and proceedings; that is our major problem. That may not be totally rectified by this procedure but it can be speeded up by direct meetings with the deputy minister's counsels, deputies and the minister and getting their co-operation to answer our correspondence faster. When you get six-, seven- and eight-week delays in answering a letter, that is what really hurts and that is what hurts the complainant.

I have instituted a procedure now where I am meeting with all the deputies and meeting with the ministers, one by one, to specify this distinct problem and to get their co-operation in speeding up their correspondence and answers for us. In some cases it has already paid dividends. Talk about delays; that is one of the major problems of delays.

Mr. Philip: I am glad to hear that. I did not hear you answer my question on whether or not there are certain areas, such as HUDAC, where you feel you should have investigatory powers and jurisdiction over them.

Dr. Hill: I think I would have to consider that a little more, Mr. Philip, before I could answer that question.

Mr. Philip: Unfortunately I must get back into the other committee, but I thank you, Mr. Chairman.

Mr. Chairman: Perhaps, Mr. Van Horne, I should give you an opportunity to continue this morning.

Mr. Philip: And thank you, Mr. Van Horne.

Mr. Van Horne: It is my pleasure.

I have a few specifics, Mr. Chairman, if you will allow me. I tried to indicate at the beginning of my comments that we had to be mindful of what we are doing here as a committee and not get ourselves hung up with all of the details of dollars and cents. I think there is a role there for the Board of Internal Economy.

If I may just go to your opening statement, which we find on page 8 of the committee Hansard of September 6, you say you are

committed to a salary administration program that is equitable and also comparable to other branches of government. I see in your letter to the Speaker, when you presented the estimates that—and these are your words:

"You will note we have not allocated any moneys for performance increases. We were instructed to budget salaries as of October 31, 1983, and await instructions from the Board of Internal Economy before we process any salary increases."

I am trying to underline that we should see ourselves as looking at the things that affect your efficiency and not necessarily get into the mechanics of your salary process.

That then leads me to the question you raised in your statement. You indicated the number of people you now have on staff. On page 10 of your statement you said: "There are 122 on staff at present. This includes six articling students, who are not counted for complement."

11:40 a.m.

We understood that a year ago you had 125 people on staff. That was the number that was commonly accepted. I do not know our source of that information but it sticks in my mind pretty clearly. Again, given that our general concern is the efficiency and effectiveness of your office, this would reflect a decrease of three.

Did that earlier number include the six or any number of articling students? What I am trying to get at is, are we comparing apples and apples? Did the articling group fall into the same classification as permanent staff or not?

Related to that, in your estimates you have charts indicating that in the North Bay area there are nine people on that regional chart. Is that an increase or decrease from a year ago? Beyond that, you have the additional couple on staff. That would be 11 as opposed to nine or whatever other number you have outside the Metro area.

Mrs. Meslin: I do not know where you got the nine in North Bay.

Dr. Hill: Could our controller answer some of them for you? I think he has the figures at his fingertips.

Mr. Van Horne: Let me see if I can find the nine. I may have misread the chart.

Mrs. Meslin: That is all the regional staff.

Dr. Hill: I think the total is nine.

Mr. Van Horne: Is that the total? Is there nothing in addition to that? The two are not tacked on to that.

Dr. Hill: No.

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Mr. Van Horne: That is the last sheet. I have one further question relating to vacancies.

Mr. Mills: The letter you quoted from is signed by the previous temporary Ombudsman. The third paragraph you quoted is instructions we received from the Board of Internal Economy. They apply to all the agencies that report to the Legislative Assembly. There was a general prohibition against budgeting for either cost of living increases or performance increases. Presumably, that was done pending the government's decision on inflation restraint legislation. We were simply following the rules as they were given to us.

Mr. Van Horne: That is more the concern of the Board of Internal Economy than it is ours. My concern is with the numbers. Are you becoming more cost-efficient, implementing management by results and so on?

Dr. Hill: We are beginning to.

Mr. Van Horne: I am curious about the overall numbers, the 122 versus what I thought was 125.

Mr. Mills: I am not familiar with how the figure 125 was arrived at. Our approved complement is 122 people. That excludes articling students, however many there may be at any time. There is often a period of overlap during the year when we have as many as 12 on staff, but that is only for a matter of weeks.

The approved complement is 122. In addition to that, we apply for and receive funds to pay the salaries of articling students, of whom there are usually six. From time to time, on a part-time basis we have noncomplement positions. As far as the board is concerned, our approved complement is 122 people. That varies as there are vacancies, as people resign and as management decides not to fill certain vacancies.

Mr. Van Horne: Going back to the Ombudsman's opening statement, he said, "I am pleased to state that we now have on staff a young native person from Thunder Bay," and so on. We talked about two people. Are the two included in the 122 or are they add-ons?

Mr. Mills: We intend to fill them from the existing complement. We do not intend to go outside 122 to staff the office.

Mr. Van Horne: Any change has to be approved by the Board of Internal Economy?

Mr. Mills: Any change that exceeds 122.

Mr. Van Horne: I realize the charts are outdated, but I am assuming the same pattern

would exist over the months. There is a vacancy rate of about eight per cent. Is that common?

Mr. Mills: Yes. In my experience, it is common over the last two fiscal years.

Mr. Van Horne: If those positions are budgeted, depending on how diligent you are in your replacement process, you might save some money.

Mr. Mills: That is the chief source.

Dr. Hill: We look very carefully at any vacancies before we replace them.

Mr. Van Horne: I have a couple of questions I would like to defer. I will pass to someone else.

Mr. Lane: Dr. Hill, I would like a couple of clarifications about your statement this morning. On page 4, in the second paragraph, you state, "We have saved \$39,000 by deciding not to hold hearings." Could you just tell me what hearings you are referring to?

Dr. Hill: Hearings across the province, when we went out to explain the role of the Ombudsman. We generally called on different cities, with two people going out and putting an ad in the paper stating that the Ombudsman was coming to town and that anyone who had a complaint could come to the meeting room and lodge that complaint.

We have discontinued the hearings because, after we analysed it, we found them to be most unprofitable in terms of people attending. Three people would come out to some. In the north particularly we would have nine people at a hearing. We sent staff people up there at a cost of hundreds and hundreds of dollars.

We have turned that around, Mr. Lane, and, as I said earlier, we are now getting ready. In October and November we are going on the road, but with a different concept, with the community meeting sort of concept, where the hearing and complaint are just part of it. That is where the saving comes. It was just an unprofitable venture.

Mr. Lane: I am glad to hear that because I certainly have to agree with you that those hearings were not productive.

Dr. Hill: We lost a lot of money.

Mr. Lane: I know the people in my area who went to see you were the chronic complainers who do not accept anyone's answer for anything, and there is just no end to that type of thing. I am glad to hear that was what you meant. I thought that was what you meant.

Dr. Hill: I had the staff do a review of most of the hearings and the kinds of people who were

coming out to them, and, as you said, they were the chronic complainers, and we were not getting anyone there for the most part.

Mr. Lane: The other clarification I would like is on page 9, the bottom paragraph. You are talking about the outreach program, including committee meetings and distribution of pamphlets, newsletters, etc. You say, "I intend to arrange community meetings by working in conjunction with local groups, and this will reduce expenditures for the meeting itself, rental of the hall, advertising, etc."

Again, I hope I am reading that correctly. Are you saying you are probably going to be having those meetings at the band office on a reserve; in other words, you are not going to be renting a hall to have a meeting?

Dr. Hill: For example, we are going to do a very wide sweep of reserves coming up this fall, and I certainly hope that we will be using the band council facilities and offices. That should be cost-free.

Mr. Lane: As long as it is nonpolitical. I can see the problem of using a political office, although I would—

Dr. Hill: No. I am thinking of band council offices and responsible representative community agencies that have offices.

Mr. Lane: Even municipal offices in the north are completely nonpolitical. I use them and my federal member uses them. He is of a different political persuasion than I am, so there is nothing political about it.

The people are happy to have the service and it saves money. People would probably not even go to the other facilities because it is not customary to go to a hall or some place, whereas the municipal office or the band office is where they go to do business.

Dr. Hill: I like to meet where the people are comfortable, and they will make the decision where we meet when we go north. We are just not going to rent a hotel somewhere. I am going to look that over very carefully. I would like to meet where people are comfortable and I will get some advice about where the people would like to meet.

Mr. Lane: I certainly appreciate all of your statements this morning, but those two things in particular stand out to me as real savings because they were a dead loss.

Mr. Breithaupt: Mr. Chairman, I wanted to follow through on Mr. Lane's comment with respect to the travelling opportunities that have occurred to go to communities, to go to the

library or wherever, and to advertise that those who have problems might attend and have them discussed.

Under your new program it would appear that, if you are going to be using other organizations to organize the meetings and the location for them, you are more likely then to deal with the members of the service club or whoever it might be on an educational basis.

11:50 a.m.

If you do that, though, you will not likely have the wider publicity for that meeting which might bring out a person who has a legitimate complaint, who is not one of the chronic complainers referred to, and who may not have had any other opportunity to contact the Ombudsman's office.

I realize you cannot run a system based on the one person who may show up in a community and accept that as value for the cost of this whole program. It seems to me, however, if you can tie in with the organization that might be sponsoring you, some broader kind of community advertising, you might be able to accommodate both the results you apparently wish.

It appears obvious that you want, through an educational program, to tell the Lions Club, or whatever it may be, the functions of the office and talk about the prospects of resolving individual problems. If you are able to tie in some kind of opportunity for an individual to show up at the same time, the end result may be not only a net saving of money. If you do not have to arrange the location, but do the advertising and cover at least those costs, it may also bring out that individual you are trying to help who, for one reason or another, has not written or contacted the local member or done other things.

How do you see that balance? While it may avoid dealing with the two or three so-called chronic complainers, who may be dissatisfied with a result you have no opportunity to change, you want to contact and have a relationship with that one person who has a legitimate complaint and who takes the opportunity to show up that day.

Dr. Hill: Perhaps I can answer that this way, Mr. Breithaupt. We have in the past gone out to towns and put a little ad in the local paper and that is it. We may continue to do that because advertising in small newspapers is not very costly, but there is another mechanism we have totally failed to address and it may answer your question.

We have not put notices in the Lions Club newsletter, church bulletins, service club opera-

tions bulletins or the bulletins and newsletters of government agencies, and I have been instructing my staff to use and work with those community and government organizations that have publicity and materials and to piggyback on them.

Mr. Breithaupt: Most senior citizen groups or centres have a newsletter, and it is just as easy to visit there as it is to hire a hall.

Dr. Hill: Exactly. We have never done that. As part of developing a new kind of relationship, I hope they will co-operate with us and let us piggyback and put our information in their brochures and newsletters. Similarly, I would like to insert material in some of the newspapers and things the native people have.

We have not used the community organizations' media facilities the way we should, and I intend to do that.

Mr. Breithaupt: You may also have the opportunity to deal much more with the open-line programs that are apparently a feature of modern radio most mornings in most communities. That is, as well, a chance to contact the group of people who tune in regularly and have opinions on most subjects. They may well want to contact you.

Dr. Hill: And that is low cost to us as far as I am concerned.

Mr. Breithaupt: I think most of them are delighted to have a theme for the day.

Dr. Hill: It is low-cost material and a way we can extend ourselves, but it does not negate the use of the media and the local newspapers. I still want to put ads in there as well.

Mr. MacQuarrie: I am certainly pleased with the approach the Ombudsman is taking in dealing with his office, mainly the conciliatory approach in dealing with government agencies, and also the emphasis you are putting on fiscal management and control.

I have had the feeling for some time that in the Ombudsman's office we have an elephant by the tail in respect of the size of the operation and the amount of production, shall we say—the productivity. Can you tell me how your staff complement compares with complements in other jurisdictions in which ombudsmen operate, not only Canadian jurisdictions but also jurisdictions in Europe, Australia and New Zealand?

Dr. Hill: A very quick answer is that it is higher. I inherited a staff with a ratio higher than in most jurisdictions. Sometimes I try to explain it by saying we have nine million people in Ontario but they have 75 million in France.

Mr. MacQuarrie: There are about nine million in Sweden.

Dr. Hill: Exactly. Nine million in Sweden, so it is higher. On the other hand, I hope that by reallocating the resources and the staff people I have, I can give better service to outlying and regional areas.

I cannot defend or argue about why it is so much higher than it is in England, Sweden, Germany or all the places I saw this summer. I can say that I can bloody well use the staff I have more effectively.

Mr. MacQuarrie: Fair enough.

Mr. Breithaupt: Recognizing that there are also perhaps differences between the responsibilities that are given to some offices and those given to yours.

Dr. Hill: I can also say it is going to be—my staff are not allowed to hear this—awfully difficult to get more staff.

Mr. Breithaupt: We can assure you of that.

Mr. MacQuarrie: We as members of the Legislature tend to look at your office as an office of allies, because in many instances we are dealing with the same sorts of problems. We in our own way, I suppose, are ombudsmen as well for our constituents, and our fight is with the bureaucracy. Over the past few years we have received quite a bit of assistance in the form of extra staff, constituency office staff and the rest of it to carry on these battles.

Mr. Cooke: Extra staff? When did we get extra staff?

Mr. MacQuarrie: So in dealing with the bureaucracy, not only through your office but also through the members of the Legislature, the public of Ontario is fairly well looked after.

I wonder if I could turn to your remarks of today. You mentioned discussions with Bell Canada concerning a potential saving of \$250,000 over 10 years.

Dr. Hill: What page is that?

12 noon

Mr. MacQuarrie: Page 4. I wonder if at the time you had also looked into the possibility of acquiring your own PBX, which seems in offices of your size to be a very economical way of dealing with telecommunications, far more economical than Bell.

For instance, Mitel puts out a PBX that could handle an office of your size without very much problem at all. All you have to do is pay Bell for the lines. I find, and a lot of companies have found in dealing with Bell and in using Bell

equipment, that it is sometimes more expensive than going the other route.

The other point is on page 6, where you indicate that you have also instituted a policy of placing all fast-action complaints that come from one complainant in a numbered folder. Do you encounter many what could be described as chronic complainers? Are there often more than 10 files or complaints a year from any one person?

Dr. Hill: Mrs. Meslin will answer that.

Mrs. Meslin: We certainly do.

Mr. MacQuarrie: You have your regulars who come to the Ombudsman first?

Dr. Hill: We see them all the time. Mr. Mills will answer your original question on the PBX.

Mr. Mills: We are in the very early stages of exploring alternatives for telephone equipment. We received an unsolicited proposal from Bell Canada to install a Centrex-III system which would replace our Centrex-II equipment. We are also mindful of the economies to be achieved by buying equipment.

One of the difficulties in buying equipment is that one must then contract with someone to maintain the service. Given our present billing system, as long as we have what is called a straight set, the charge is for the line and not for the set. There would be no saving in buying equipment.

Bell provides a straight set with every line. The charge is for the line rather than the set. When you get into what are called six-button sets, then you pay for the set, you pay for the elimination and all the other good things.

I was only trying to make the point that we are examining alternatives, and we are in the very early stages of doing that.

Mr. MacQuarrie: Right. One of the government ministries was also looking into the prospects of going for a PBX system.

Mr. Mills: A recent article in the Star suggests residential users will save as a function of buying their own equipment, but commercial users will pay more. I would like to explore that.

Mr. MacQuarrie: I raised it as a question. I was interested in complaints because sometimes we have these habitual complainers.

I was also thinking about your computer capacity or word processing equipment. What type of word processing equipment are you using now?

Mr. Mills: Wang.

Mr. MacQuarrie: It has very limited computer capacity.

Mr. Mills: Yes.

Mr. MacQuarrie: What language are you using?

Mr. Mills: Wang Basic is what we use to program our in-progress system.

Mr. MacQuarrie: Is the University of Toronto switching off Basic?

Mr. Mills: At the University of Toronto we employ a language called Mark IV. It has decided to withdraw support for Mark IV and tout, advocate, market or peddle SAS. This is where the costs will be incurred if we stick with U of T. With our own equipment we could program in virtually any language we choose.

Mr. MacQuarrie: You have indicated in one part of the statement you are investigating equipment with four firms and then, on page 8, go on to say you have received a proposal from Wang to lease new equipment. Is there a contradiction there?

Mr. Mills: No. Wang initiated this proposal. Its representatives made it to us.

During the Provincial Auditor's examination of our office it was suggested we should have a proper feasibility study conducted. We approached the Ministry of Government Services to see if it would perform the service. It could not, but gave us the names of about half a dozen firms that could perform the feasibility study. We have contacted four of them, they made proposals and we shortlisted them. Mrs. Meslin and I have decided on one that seems best able to do what the Provincial Auditor wants us to do.

Mr. MacQuarrie: Will doing what the Provincial Auditor wants you to do also do everything you want to do?

Mrs. Meslin: I think you have misunderstood, Mr. MacQuarrie. There is a difference. The feasibility study is going to tell us what they believe our needs are. After we get the feasibility study and their recommendations as to various companies that can supply equipment, we will then tender those companies. It is stage 1 and stage 2. Wang may or may not be one of the companies suggested that should tender after the feasibility study.

Mr. MacQuarrie: What you are involved with now is a feasibility study?

Mrs. Meslin: That is right.

Mr. MacQuarrie: We will have a feasibility study performed. In this regard, four firms have been invited to make proposals.

Mrs. Meslin: Yes.

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Mr. MacQuarrie: That is for the feasibility study.

Mrs. Meslin: Yes.

Mr. MacQuarrie: I am sorry. I misunderstood.

Mr. Hennessy: I am interested in the suggestion that you hold meetings in different areas. I would be in favour of holding them at the band offices or at the Ombudsman's office. I would not be in favour of holding them at city hall or the municipal offices where the politicians can enter into it. If you have them at city hall, they can walk into city hall, take their seats and get into the process. It becomes a political thing rather than listening to what the argument is from the people in regard to the problem.

If they want to attend a meeting at the band office, that is their prerogative. If they want to go to your office, that is their prerogative also. However, in all fairness, if you are listening to people who have complaints, you are interested in their being comfortable and they may not be comfortable in a political arena.

I am just saying that, if you are interested, there are other places to go. You can go to a private hall where a person is comfortable.

People who are in the political game will recommend that you hold it in a political arena. The average person would not dare mention, "Where are we going to have it?" because he is a little shy about telling you where to hold a meeting.

To get something done, it would be much better if you have it at the band office, where the natives will be happy, or at the Ombudsman's office, where they will feel the security of the Ombudsman to some extent. You might get more dialogue back and forth. That is my suggestion.

Dr. Hill: Mr. Hennessy, let me assure you that I intend to use the same procedure I used when I was chairman of the human rights commission. When I was up north, I held my meetings on the reserves.

Mr. Hennessy: They would be happier and you would get more people out, because they are in their own confines.

Dr. Hill: They can also help us to organize them on the reserves. It is their property and their area. I will do the same as I did when I was previously with government. Those meetings will be held on the reserves.

Mr. Hennessy: At the Mission band at Thunder Bay there is a large hall where you can seat a lot of people.

Dr. Hill: My staff has already alerted me to the political nuances, so I am quite aware of it.

Mr. Hennessy: I like to see that people get fair hearings rather than somebody trying to get political marks from it.

Dr. Hill: I agree with that approach.

Mr. Chairman: Dr. Hill, in your remarks you mentioned complying with the Manual of Administration. We made a recommendation last year about bringing in the Provincial Auditor to review your policies. Has anything been done in that regard?

Dr. Hill: Yes. They have come in and reviewed them.

12:10 p.m.

Mr. Chairman: One thing I wanted to talk about, and we have talked about it in years gone by, is the time delay from the initial complaint to the point of bringing it to this committee. I thought there was one case, and there may be others, that we dealt with during these hearings. It was the superannuation problem. It seemed to me that it was brought to you in 1981 and did not get to this committee until 1984.

It did not seem to be that complex a problem, and I am just wondering about the time frame on it—the fact of the initial complaint in 1981 and its coming before this committee in 1984.

Dr. Hill: Are you referring to just that specific complaint or to a number of complaints?

Mr. Chairman: That one caught my eye because it did not seem to be that complex a situation.

Dr. Hill: In principle let me say this, and then maybe Ms. Bohnen may have something to say. I pulled together Linda Bohnen, Michael Zacks and Eleanor Meslin to do everything they possibly can to cut down the period of time involved in having complaints handled. I think that is an absolute priority and we hope to have some type of system in place to really cut into this whole problem of speed in handling complaints without sacrificing professional quality.

I hope I will have some kind of system in place by December. I know it is a problem, I acknowledge it as a problem and it is going to be rectified.

The other thing I would like to say is that if Linda would like to address that particular case, by all means do so. But I want to assure you that this is a worry of mine and that I am in to it.

Ms. Bohnen: I cannot comment today on the time it took for the investigation and so on to take place, but I do know that all the work on the case

was completed very early in the previous fiscal year. Because Mr. Morand and Mr. McArdle did not choose to issue any special reports it meant there was a delay of a year before the case could be reported, and then I suppose it is almost six months until it comes to this committee.

You saw in the special report Dr. Hill issued that we have decided to issue special reports to avoid waiting time before matters can come to the attention of this committee. I think one thing Dr. Hill will want to know, before issuing future special reports of that type, is realistically how frequently this committee will be able to convene to receive them.

We can issue all the special reports we like during the year but we are still going to have to wait until the next September for this committee to consider them.

Mr. Chairman: That answers my concern: you are addressing the issue of trying to speed up the process.

Of course, the other matter of when this committee will be sitting is something that we as

a committee can be discussing and perhaps meeting with you to discuss too. We may indeed have to sit more frequently than we have in the past to try to help that process along.

We certainly are nowhere approaching the time allocation of three hours, but obviously we have exhausted the questioning and I am prepared to put the question.

Vote 1301 agreed to.

Mr. Chairman: Shall I report the estimates of the Office of the Ombudsman to the Legislature, without amendment?

Agreed.

Mr. Chairman: Thank you very much. Are you going to be here this afternoon, Dr. Hill, when we are dealing with correspondence from the public?

Dr. Hill: Yes. I have another presentation to make.

The committee recessed at 12:15 p.m.

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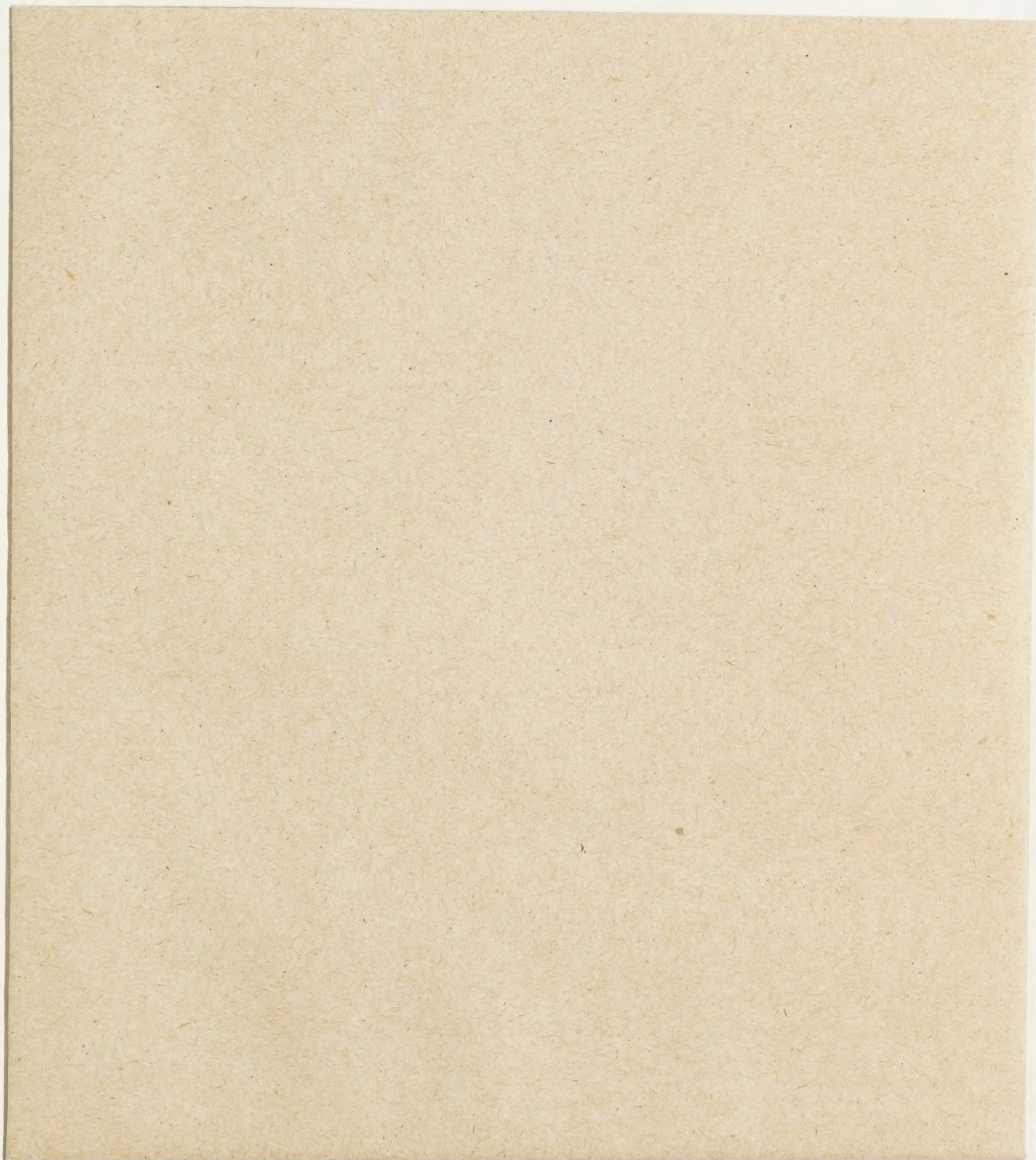
SPEAKERS IN THIS ISSUE

Breithaupt, J. R. (Kitchener L)
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 Hennessy, M. (Fort William PC)
 Lane, J. G. (Algoma-Manitoulin PC)
 MacQuarrie, R. W. (Carleton East PC)
 Philip, E. T. (Etobicoke NDP)
 Runciman, R. W. (Leeds PC); Chairman
 Van Horne, R. G. (London North L)

From the Office of the Ombudsman:

Hill, Dr. D. G., Ombudsman
 Meslin, E., Executive Director
 Mills, A., Controller
 Zacks, M., Director, Legal Services

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